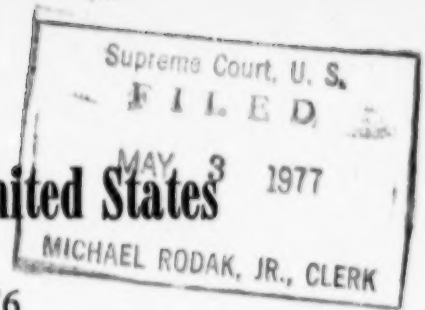


IN THE
Supreme Court of the United States



October Term 1976

No. 8, Original of
October Term 1965

STATE OF ARIZONA,

Complainant,

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CITY OF SAN DIEGO, and COUNTY OF SAN DIEGO,

Defendants,

UNITED STATES OF AMERICA and STATE OF NEVADA,

Interveners,

STATE OF NEW MEXICO and STATE OF UTAH,

Impleaded Defendants.

Joint Motion for a Determination of Present Perfected Rights and the Entry of a Supplemental Decree; Proposed Supplemental Decree; and Memorandum in Support of Proposed Supplemental Decree

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Defendants,

UNITED STATES OF AMERICA and STATE OF NEVADA,

Interveners,

STATE OF NEW MEXICO and STATE OF UTAH,

Impleaded Defendants.

**Motion for the Determination of Present Perfected
Rights and the Entry of a Supplemental Decree**

STATE OF ARIZONA, Complainant, the California Defendants (STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CITY OF SAN DIEGO, COUNTY OF SAN DIEGO) and STATE OF

NEVADA, Intervener, respectfully moved this Court for a determination of present perfected rights as set forth in the submitted proposed supplemental decree and for the entry of a supplemental decree in the form submitted and agreed upon herewith by all the moving parties in this action.

This motion is made pursuant to Article VI of the Decree entered in this case on March 9, 1964, at 376 U.S. 340 (1964) and amended on February 28, 1966, at 383 U.S. 268 (1966) on the following grounds, elaborated upon in more detail in the memorandum in support of the entry of the proposed supplemental decree, submitted herewith:

1. Article VI of the Decree in this case provides for a determination of present perfected rights by this Court if the parties and the Secretary of the Interior are unable to agree on such rights. The moving parties have been unable to secure the agreement of the Secretary of the Interior.

2. The Secretary of the Interior has no valid basis for his refusal to agree to the lists of present perfected rights set forth in the proposed supplemental decree submitted herewith.

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STATE OF ARIZONA,

Complainant,

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CITY OF SAN DIEGO, and COUNTY OF SAN DIEGO,

Defendants,

UNITED STATES OF AMERICA and STATE OF NEVADA,

Interveners,

STATE OF NEW MEXICO and STATE OF UTAH,

Impleaded Defendants.

Proposed Supplemental Decree

The States of Arizona, California and Nevada, Palo Verde Irrigation District, Imperial Irrigation District, Coachella Valley County Water District, The Metropolitan Water District of Southern California, the City of Los Angeles, the City of San Diego and the County of San Diego have all agreed to the present perfected rights to the use of mainstream water in each state and their priority dates as set forth herein. Those

parties have been unable to secure the agreement of the Secretary of the Interior, required by Article VI of the Decree entered in this case on March 9, 1964, at 376 U.S. 340 (1964) and amended on February 28, 1966, at 383 U.S. 268 (1966) in order to settle this matter by stipulation. Therefore, pursuant to Article VI, it is hereby **ORDERED, ADJUDGED, AND DECREED** that said present perfected rights in each State and their priority dates are determined to be as set forth below subject to the following:

(1) The following listed present perfected rights relate to the quantity of water which may be used by each claimant and is not intended to limit or redefine the type of use otherwise set forth in said Decree.

(2) This determination shall in no way affect future adjustments resulting from determinations relating to settlement of Indian reservation boundaries referred to in Article II(D) (5) of said Decree.

(3) Article IX of said Decree is not affected by this list of present perfected rights.

(4) Any water right listed herein may only be exercised for beneficial and reasonable uses.

(5) In the event of a determination of insufficient mainstream water to satisfy present perfected rights pursuant to Article II(B) (3) of said Decree, the Secretary of the Interior shall, before providing for the satisfaction of any of the other present perfected rights except for those listed herein as "MISCELLANEOUS PRESENT PERFECTED RIGHTS," (rights numbered 7-21 and 29-80 below) in the order of their priority dates without regard to State lines, first provide for the satisfaction in full of all rights of the

Chemehuevi Indian Reservation, Cocopah Indian Reservation, Yuma Indian Reservation, Colorado River Indian Reservation, and the Fort Mohave Indian Reservation as set forth in Article II(D) (1)-(5) of said Decree, plus such additional present perfected rights as may be hereafter established by decree or future stipulation that are based upon orders of the Secretary of the Interior enlarging the boundaries of said reservations that have been issued between the date of said Decree and May 2, 1977. However, such additional rights to diversions of mainstream water shall not exceed the quantities necessary to supply the consumptive use required for irrigation of the additional practicably irrigable acres within the additional areas resulting from the enlarged boundaries. The quantities of such diversions are to be computed by determining net practicably irrigable acres within each additional area using methods set forth by the Special Master in this case in his Report to this Court dated December 5, 1960, and by applying the unit diversion quantities thereto, as listed below:

<u>Indian Reservation</u>	<u>Unit Diversion Quantity Acre-feet per Irrigable Acre</u>
Cocopah (Arizona)	6.37
Colorado River (California)	6.67
Chemehuevi (California)	5.97
Ft. Mojave (California)	6.46

Effect shall be given to this paragraph notwithstanding the priority dates of the present perfected rights as listed below. However, nothing in this paragraph (5) shall affect the order in which such rights listed below as "MISCELLANEOUS PRESENT PERFECTED RIGHTS," (rights numbered 7-21 and 29-80 below) shall be satisfied. Furthermore, nothing in this para-

graph shall be construed to determine the order of satisfying any other Indian water rights claims not herein specified.

I ARIZONA

A. Federal Establishments Present Perfected Rights

The federal establishments named in Article II, subdivision (D), paragraphs (2), (4) and (5), of the Decree entered March 9, 1964 in this case, such rights having been decreed in Article II:

Defined Area of Land	Annual Diversions (acre-feet) ¹	Net Acres ¹	Priority Date
1) Cocopah Indian Reservation	2,744	431	Sept. 27, 1917
2) Colorado River Indian Reservation	358,400 252,016 51,986	53,768 37,808 7,799	Mar. 3, 1865 Nov. 22, 1873 Nov. 16, 1874
3) Fort Mohave Indian Reservation	27,969 68,447	4,327 10,589	Sept. 18, 1890 Feb. 2, 1911

B. Water Projects Present Perfected Rights

(4) *The Valley Division, Yuma Project* in annual quantities not to exceed (i) 254,200 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 43,562 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with a priority date of 1901.

(5) *The Yuma Auxiliary Project, Unit B* in annual quantities not to exceed (i) 6,800 acre-feet of diversions from the mainstream or (ii) the

¹The quantity of water in each instance is measured by (i) diversions or (ii) consumptive use required for irrigation of the respective acreage and for the satisfaction of related uses, whichever of (i) or (ii) is less.

quantity of mainstream water necessary to supply the consumptive use required for irrigation of 1,225 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with a priority date of July 8, 1905.

- (6) *The North Gila Valley Unit, Yuma Mesa Division, Gila Project* in annual quantities not to exceed (i) 24,500 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 4,030 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with a priority date of July 8, 1905.

C. Miscellaneous Present Perfected Rights

1. The following miscellaneous present perfected rights in Arizona in annual quantities of water not to exceed the listed acre-feet of diversion from the mainstream to supply the consumptive use required for irrigation and the satisfaction of related uses within the boundaries of the land described and with the priority dates listed:

<u>Defined Area of Land</u>	<u>Annual Diversions (acre-feet)</u>	<u>Priority Date</u>
7) 160 acres in Lots 21, 24, and 25, Sec. 29 and Lots 15, 16, 17 and 18, and the SW1/4 of the SE1/4, Sec. 30, T.16S., R.22E., San Bernardino Base and Meridian, Yuma County, Arizona (Powers) ²	960	1915

²The names in parentheses following the description of the "Defined Area of Land" are used for identification of present perfected rights only; the name used is the first name appearing as the Claimants identified with a parcel in Arizona's 1967 list submitted to this Court.

<u>Defined Area of Land</u>	<u>Annual Diversions (acre-feet)</u>	<u>Priority Date</u>
8) Lots 11, 12, 13, 19, 20, 22 and S1/2 of SW1/4, Sec. 30, T.16S., R.22E., San Ber- nardino Base and Meridian, Yuma County, Arizona (United States) ³	1,140	1915
9) 60 acres within Lot 2, Sec. 15 and Lots 1 and 2, Sec. 22, T.10N., R.19W, G&SRBM. (Graham) ²	360	1910
10) 180 acres within the N1/2 of the S1/2 and the S1/2 of the N1/2 of Sec. 13 and the SW1/4 of the NE1/4 of Sec. 14, T.18N., R.22W., G&SRBM. (Hulet) ²	1,080	1902
11) 45 acres within the NE1/4 of the SW1/4,) the SW1/4 of the SW1/4 and the SE1/4) of the SW1/4 of Sec. 11, T.18N., R.22W.,) G&SRBM.)	1,050	1902
80 acres within the N1/2 of the SW1/4 of) Sec. 11, T.18N., R.22W., G&SRBM.)		
10 acres within the NW1/4 of the NE1/4) of the NE1/4 of Sec. 15, T.18N., R.22W.,) G&SRBM.)		
40 acres within the SE1/4 of the SE1/4 of) Sec. 15, T.18N., R.22W., G&SRBM.) (Hurschler) ²)		
12) 40 acres within Sec. 13, T.17N., R.22W., G&SRBM. (Miller) ²	240	1902
13) 120 acres within Sec. 27, T.18N., R.21W.,) G&SRBM.)	810	1902
15 acres within the NW1/4 of the NW1/4,) Sec. 23, T.18N., R.22W., G&SRBM.) (McKellips and Granite Reef Farms) ⁴)		

³Included as a part of the Powers' claim in Arizona's 1967 list submitted to this Court. Subsequently, the United States and Powers agreed to a Stipulation of Settlement on land ownership whereby title to this property was quieted in favor of the United States.

⁴The names in parentheses following the description of the "Defined Area of Land" are the names of claimants, added since the 1967 list, upon whose water use these present perfected rights are predicated.

<u>Defined Area of Land</u>	<u>Annual Diversions (acre-feet)</u>	<u>Priority Date</u>
14) 180 acres within the NW1/4 of the NE1/4, the SW1/4 of the NE1/4, the NE1/4 of the SW1/4, the NW1/4 of the SE1/4, the NE1/4 of the SE1/4, and the SW1/4 of the SE1/4, and the SE1/4 of the SE1/4, Sec. 31, T.18N., R.21W., G&SRBM. (Sherrill & Lafollette) ⁴	1,080	1902
15) 53.89 acres as follows: Beginning at a point 995.1 feet easterly of the NW corner of the NE1/4 of Sec. 10, T.8S., R.22W., Gila and Salt River Base and Meridian; on the northerly boundary of the said NE1/4, which is the true point of beginning, then in a southerly direction to a point on the southerly boundary of the said NE1/4 which is 991.2 feet E. of the SW corner of said NE1/4 thence easterly along the S. line of the NE1/4, a distance of 807.3 feet to a point, thence N. 0°7' W., 768.8 feet to a point, thence E. 124.0 feet to a point, thence northerly 0°14' W., 1,067.6 feet to a point, thence E. 130 feet to a point, thence northerly 0°20' W., 405.2 feet to a point, thence northerly 63°10' W., 506.0 feet to a point, thence northerly 90° 15' W., 562.9 feet to a point on the northerly boundary of the said NE1/4, thence easterly along the said northerly boundary of the said NE1/4, 116.6 feet to the true point of the beginning containing 53.89 acres. All as more particularly described and set forth in that survey executed by Thomas A. Yowell, Land Surveyor on June 24, 1969. (Molina) ⁴	318	1928
16) 60 acres within the NW1/4 of the NW1/4) and the north half of the SW1/4 of the NW1/4 of Sec. 14, T.8S., R.22W.,) G&SRBM.)	780	1925
70 acres within the S1/2 of the SW1/4 of) the SW1/4, and the W1/2 of the SW1/4,) Sec. 14, T.8S., R.22W., G&SRBM.) (Sturges) ⁴)		
17) 120 acres within the N1/2 NE1/4, NE1/4 NW1/4, Section 23, T.18N. R.22W., G&SRBM (Zozaya) ⁴	720	1912

<u>Defined Area of Land</u>	<u>Annual Diversions (acre-feet)</u>	<u>Priority Date</u>
18) 40 acres in the W1/2 of the NE1/4 of Section 30, and 60 acres in the W1/2 of the SE1/4 of Section 30, and 60 acres in the E1/2 of the NW1/4 of Section 31, comprising a total of 160 acres all in Township 18 North, Range 21 West of the G&SRBM. (Swan) ⁴	960	1902
19) 7 acres in the East 300 feet of the W1/2 of Lot 1 (Lot 1, being the SE1/4 SE1/4, 40 acres more or less), Section 28, Township 16 South, Range 22 East, San Bernardino Meridian, lying North of U.S. Bureau of Reclamation levee right of way. EXCEPT that portion conveyed to the United States of America by instrument recorded in Docket 417, page 150 EXCEPTING any portion of the East 300 feet of W1/2 of Lot 1 within the natural bed of the Colorado River below the line of ordinary high water and also EXCEPTING any artificial accretions waterward of said line of ordinary high water, all of which comprises approximately seven (7) acres (Milton and Jean Phillips). ⁴	42	1900

2. The following miscellaneous present perfected rights in Arizona, in annual quantities of water not to exceed the listed number of acre-feet of (i) diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use, whichever of (i) or (ii) is less, for domestic, municipal, and industrial purposes within the boundaries of the land described and with the priority dates listed:

<u>Defined Area of Land</u>	<u>Annual Diversions (acre-feet)</u>	<u>Annual Consumptive Use (acre-feet)</u>	<u>Priority Date</u>
20) City of Parker ²	630	400	1905
21) City of Yuma ²	2,333	1,478	1893

II CALIFORNIA

A. Federal Establishments Present Perfected Rights

The federal establishments named in Article II, subdivision (D), paragraphs (1), (3), (4), and (5) of the Decree entered March 9, 1964 in this case such rights having been decreed by Article II:

Defined Area of Land	Annual Diversions (acre-feet) ⁵	Net Acres ⁵	Priority Date
22) Chemehuevi Indian Reservation	11,340	1,900	Feb. 2, 1907
23) Yuma Indian Reservation	51,616	7,743	Jan. 9, 1884
24) Colorado River Indian Reservation	10,745 40,241 3,760	1,612 6,037 564	Nov. 22, 1873 Nov. 16, 1874 May 15, 1876
25) Fort Mohave Indian Reservation	13,698	2,119	Sep. 18, 1890

B. Water Districts and Projects Present Perfected Rights

26)

The Palo Verde Irrigation District in annual quantities not to exceed (i) 219,780 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 33,604 acres and for the satisfaction of related uses, which-

⁵The quantity of water in each instance is measured by (i) diversions or (ii) consumptive use required for irrigation of the respective acreage and for satisfaction of related uses, whichever of (i) or (ii) is less.

ever of (i) or (ii) is less, with a priority date of 1877.

27)

The Imperial Irrigation District in annual quantities not to exceed (i) 2,600,000 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 424,145 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with a priority date of 1901.

28)

The Reservation Division, Yuma Project, California (non-Indian portion) in annual quantities not to exceed (i) 38,270 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 6,294 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with a priority date of July 8, 1905.

C. Miscellaneous Present Perfected Rights

1. The following miscellaneous present perfected rights in California in annual quantities of water not to exceed the listed number of acre-feet of diversions from the mainstream to supply the consumptive use required for irrigation and the satisfaction of related uses within the bound-

aries of the land described and with the priority
dates listed:

<u>Defined Area of Land</u>	<u>Annual Diversions (acre-feet)</u>	<u>Priority Date</u>
29) 130 acres within Lots 1, 2, and 3, SE1/4 of NE1/4 of Section 27, T.16S., R.22E., S.B.B. & M. (Wavers) ⁶	780	1856
30) 40 acres within W1/2, W1/2 of E1/2 of Section 1, T.9N., R.22E., S.B.B. & M. (Stephenson) ⁶	240	1923
31) 20 acres within Lots 1 and 2, Sec. 19, T.13S., R.23E., and Lots 2, 3, and 4 of Sec. 24, T.13S., R.22E., S.B.B. & M. (Mendivil) ⁶	120	1893
32) 30 acres within NW1/4 of SE1/4, S1/2 of SE1/4, Sec. 24, and NW1/4 of NE1/4, Sec. 25, all in T.9S., R.21E., S.B.B. & M. (Grannis) ⁶	180	1928
33) 25 acres within Lot 6, Sec. 5; and Lots 1 and 2, SW1/4 of NE1/4, and NE1/4 of SE1/4 of Sec. 8, and Lots 1 & 2 of Sec. 9, all in T.13S., R.22E., S.B.B. & M. (Morgan) ⁶	150	1913
34) 18 acres within E1/2 of NW1/4 and W1/2 of NE1/4 of Sec. 14, T.10S., R.21E., S.B.B. & M. (Milpitas) ⁶	108	1918
35) 10 acres within N1/2 of NE1/4, SE1/4 of NE1/4, and NE1/4 of SE1/4, Sec. 30, T.9N., R.23E., S.B.B. & M. (Simons) ⁶	60	1889
36) 16 acres within E1/2 of NW1/4 and N1/2 of SW1/4, Sec. 12, T.9N., R.22E., S.B.B. & M. (Colo. R. Sportsmen's League) ⁶	96	1921

⁶The names in parentheses following the description of the "Defined Area of Land" are used for identification of present perfected rights only; the name used is the first name appearing as the claimant identified with a parcel in California's 1967 list submitted to this Court.

<u>Defined Area of Land</u>	<u>Annual Diversions (acre-feet)</u>	<u>Priority Date</u>
37) 11.5 acres within E1/2 of NW1/4, Sec. 1, T.10S., R.21E., S.B.B. & M. (Milpitas) ⁶	69	1914
38) 11 acres within S1/2 of SW1/4, Sec. 12, T.9N., R.22E., S.B.B. & M. (Andrade) ⁶	66	1921
39) 6 acres with Lots 2, 3, and 7 and NE1/4 of SW1/4, Sec. 19, T.9N., R.23E., S.B.B. & M. (Reynolds) ⁶	36	1904
40) 10 acres within N1/2 of NE1/4, SE1/4 of NE1/4 and NE1/4 of SE1/4, Sec. 24, T.9N., R.22E., S.B.B. & M. (Cooper) ⁶	60	1905
41) 20 acres within SW1/4 of SW1/4, (Lot 8) Sec. 19, T.9N., R.23E., S.B.B. & M. (Chagnon) ⁷	120	1925
42) 20 acres within NE1/4 of SW1/4, N1/2 of SE1/4, SE1/4 of SE1/4, Sec. 14, T.9S., R.21E., S.B.B. & M. (Lawrence) ⁷	120	1915

2. The following miscellaneous present perfected rights in California in annual quantities of water not to exceed the listed number of acre-feet of (i) diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use, whichever of (i) or (ii) is less, for domestic, municipal, and industrial purposes within the boundaries of the land described and with the priority dates listed:

⁷The names in parentheses following the description of the "Defined Area of Land" are the names of the homesteaders upon whose water use these present perfected rights, added since the 1967 list submitted to this Court, are predicated.

Defined Area of Land	Annual Diversions (acre-feet)	Annual Consumptive Use (acre-feet)	Priority Date
43) City of Needles ⁶	1,500	950	1885
44) Portions of: Secs. 5, 6, 7 & 8, T.7N., R.24E.; Sec. 1, T.7N., R.23E.; Secs. 4, 5, 9, 10, 15, 22, 23, 25, 26, 35, & 36, T.8N., R.23E.; Secs. 19, 29, 30, 32 & 33, T.9N., R.23E., S.B.B. & M. (Atchison, Topeka and Santa Fe Railway Co.) ⁶	1,260	273	1896
45) Lots 1, 2, 3, 4, 5, & SW1/4 NW1/4 of Sec. 5, T.13S., R.22E., S.B.B. & M. (Conger) ⁷	1.0	0.6	1921
46) Lots 1, 2, 3, 4 of Sec. 32, T.11S., R.22E., S.B.B. & M. (G. Draper) ⁷	1.0	0.6	1923
47) Lots 1, 2, 3, 4, and SE1/4 SW1/4 of Sec. 20, T.11S., R.22E., S.B.B. & M. (McDonough) ⁷	1.0	0.6	1919
48) SW1/4 of Sec. 25, T.8S., R.22E., S.B.B. & M. (Faubion) ⁷	1.0	0.6	1925
49) W1/2 NW1/4 of Sec. 12, T.9N., R.22E., S.B.B. & M. (Dudley) ⁷	1.0	0.6	1922
50) N1/2 SE1/4 and Lots 1 and 2 of Sec. 13, T.8S., R.22E., S.B.B. & M. (Douglas) ⁷	1.0	0.6	1916
51) N1/2 SW1/4, NW1/4 SE1/4, Lots 6 and 7, Sec. 5, T.9S., R.22E., S.B.B. & M. (Beauchamp) ⁷	1.0	0.6	1924
52) NE1/4 SE1/4, SE1/4 NE1/4, and Lot 1, Sec. 26, T.8S., R.22E., S.B.B. & M. (Clark) ⁷	1.0	0.6	1916
53) N1/2 SW1/4, NW1/4 SE1/4, SW1/2 NE1/4, Sec. 13, T.9S., R. 21E., S.B.B. & M. (Lawrence) ⁷	1.0	0.6	1915

Defined Area of Land	Annual Diversions (acre-feet)	Annual Consumptive Use (acre-feet)	Priority Date
54) N1/2 NE1/4, E1/2 NW1/4, Sec. 13, T.9S., R.21E., S.B.B. & M. (J. Graham) [†]	1.0	0.6	1914
55) SE1/4, Sec. 1, T.9S., R.21E., S.B.B. & M. (Geiger) [†]	1.0	0.6	1910
56) Fractional W1/2 of SW1/4 (Lot 6) Sec. 6, T.9S., R.22E., S.B.B. & M. (Schneider) [†]	1.0	0.6	1917
57) Lot 1, Sec. 15; Lots 1 & 2, Sec. 14; Lots 1 & 2, Sec. 23; all in T.13S., R.22E., S.B.B. & M. (Martinez) [†]	1.0	0.6	1895
58) NE1/4, Sec. 22, T.9S., R.21E., S.B.B. & M. (Earle) [†]	1.0	0.6	1925
59) NE1/4 SE1/4, Sec. 22, T.9S., R.21E., S.B.B. & M. (Diehl) [†]	1.0	0.6	1928
60) N1/2 NW1/4, N1/2 NE1/4, Sec. 23, T.9S., R.21E., S.B.B. & M. (Reid) [†]	1.0	0.6	1912
61) W1/2 SW1/4, Sec. 23, T.9S., R.21E., S.B.B. & M. (Graham) [†]	1.0	0.6	1916
62) S1/2 NW1/4, NE1/4 SW1/4, SW1/4 NE1/4, Sec. 23, T.9S., R.21E., S.B.B. & M. (Cate) [†]	1.0	0.6	1919
63) SE1/4 NE1/4, N1/2 SE1/4, SE1/4 SE1/4, Sec. 23, T.9S., R.21E., S.B.B. & M. (McGee) [†]	1.0	0.6	1924
64) SW1/4 SE1/4, SE1/4 SW1/4, Sec. 23, NE1/4 NW1/4, NW1/4 NE1/4, Sec. 26; all in T.9S., R.21E., S.B.B. & M. (Stallard) [†]	1.0	0.6	1924
65) W1/2 SE1/4, SE1/4 SE1/4, Sec. 26, T.9S., R.21E., S.B.B. & M. (Randolph) [†]	1.0	0.6	1926

Defined Area of Land	Annual Diversions (acre-feet)	Annual Consumptive Use (acre-feet)	Priority Date
66) E1/2 NE1/4, SW1/4 NE1/4, SE1/4 NW1/4, Sec. 26, T.9S., R.21E., S.B.B. & M. (Stallard) [†]	1.0	0.6	1928
67) S1/2 SW1/4, Sec. 13, N1/2 NW1/4, Sec. 24; all in T.9S., R.21E., S.B.B. & M. (Keefe) [†]	1.0	0.6	1926
68) SE1/4 NW1/4, NW1/4 SE1/4 Lots 2, 3, & 4, Sec. 25, T.13S., R.23E., S.B.B. & M. (C. Ferguson) [†]	1.0	0.6	1903
69) Lots 4 & 7, Sec. 6; Lots 1 & 2, Sec. 7; all in T.14S., R.24E., S.B.B. & M. (W. Ferguson) [†]	1.0	0.6	1903
70) SW1/4 SE1/4, Lots 2, 3, and 4, Sec. 24, T.12S., R.21E., Lot 2, Sec. 19, T.12S., R.22E., S.B.B. & M. (Vaulin) [†]	1.0	0.6	1920
71) Lots 1, 2, 3, and 4, Sec. 25, T.12S., R.21E., S.B.B. & M. (Salisbury) [†]	1.0	0.6	1920
72) Lots 2, 3, SE1/4 SE1/4, Sec. 15, NE1/4 NE1/4, Sec. 22; all in T.13S., R.22E., S.B.B. & M. (Hadlock) [†]	1.0	0.6	1924
73) SW1/4 NE1/4, SE1/4 NW1/4, and Lots 7 & 8, Sec. 6, T.9S., R.22E., S.B.B. & M. (Streeter) [†]	1.0	0.6	1903
74) Lot 4, Sec. 5, Lots 1 & 2, Sec. 7, Lots 1 & 2, Sec. 8, Lot 1, Sec. 18; all in T.12S., R.22E., S.B.B. & M. (J. Draper) [†]	1.0	0.6	1903
75) SW1/4 NW1/4, Sec. 5, SE1/4 NE1/4 and Lot 9, Sec. 6; all in T.9S., R.22E., S.B.B. & M. (Fitz) [†]	1.0	0.6	1912
76) NW1/4 NE1/4, Sec. 26; Lots 2 & 3, W1/2 SE1/4, Sec. 23; all in T.8S., R.22E., S.B.B. & M. (Williams) [†]	1.0	0.6	1909

Defined Area of Land	Annual Diversions (acre-feet)	Annual Consumptive Use (acre-feet)	Priority Date
77) Lots 1, 2, 3, 4, & 5, Sec. 25, T.8S., R.22E., S.B.B. & M. (Estrada) ⁷	1.0	0.6	1928
78) S1/2 NW1/4, Lot 1, frac. NE1/4 SW1/4, Sec. 25, T.9S., R.21E., S.B.B. & M. (Whittle) ⁷	1.0	0.6	1925
79) N1/2 NW1/4, Sec. 25, S1/2 SW1/4, Sec. 24; all in T.9S., R.21E., S.B.B. & M. (Corington) ⁷	1.0	0.6	1928
80) S1/2 NW1/4, N1/2 SW1/4, Sec. 24, T.9S., R.21E., S.B.B. & M. (Tolliver) ⁷	1.0	0.6	1928

III NEVADA

A. Federal Establishments Present Perfected Rights

The federal establishments named in Article II, subdivision (D), paragraphs (5) and (6) of the Decree entered on March 9, 1964 in this case, such rights having been decreed by Article II:

Defined Area of Land	Annual Diversions (acre-feet)	Net Acres	Priority Date
81) Fort Mohave Indian Reservation	12,534 ⁸	1,939 ⁸	Sept. 18, 1890
82) Lake Mead National Rec- reation Area (The Overton Area of Lake Mead N.R.A. provided in Executive Order 5105)	500	300 ⁹	May 3, 1929 ¹⁰

⁸The quantity of water in each instance is measured by (i) diversions or (ii) consumptive use required for irrigation of the respective acreage and for satisfaction of related uses, whichever of (i) or (ii) is less.

⁹Refers to acre-feet of annual consumptive use, not to net acres.

¹⁰Article II(D)(6) of said Decree specifies a priority date of March 3, 1929. Executive Order 5105 is dated May 3, 1929, (see C.F.R. 1964 Cumulative Pocket Supplement, page 276, and the Findings of Fact and Conclusions of Law of the Special Master's Report in this case, pages 294-295).

IN THE

Supreme Court of the United States

October Term 1976

No. 8, Original of
October Term 1965

STATE OF ARIZONA,

Complainant,

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CITY OF SAN DIEGO, and COUNTY OF SAN DIEGO,

Defendants,

UNITED STATES OF AMERICA and STATE OF NEVADA,

Interveners,

STATE OF NEW MEXICO and STATE OF UTAH,

Impleaded Defendants.

MEMORANDUM IN SUPPORT OF PROPOSED SUPPLEMENTAL DECREE

I

INTRODUCTION

This action was commenced in 1952 by the State of Arizona invoking the original jurisdiction of this Court under Article III, Section 2, Clause 2 of the United States Constitution. The Opinion in this case was delivered by Mr. Justice Black on June 3, 1963,

373 U.S. 546 (1963), the Decree was entered on March 9, 1964, 376 U.S. 340 (1964), and amended on February 28, 1966, 383 U.S. 268 (1966).

Article VI of the Decree, as amended, provides that:

"Within three years from the date of this decree [March 9, 1964], the States of Arizona, California, and Nevada shall furnish to this Court and to the Secretary of the Interior a list of the present perfected rights, with their claimed priority dates, in waters of the mainstream within each state, respectively, in terms of consumptive use, except those relating to federal establishments. Any named party to this proceeding may present its claim of present perfected rights or its opposition to the claims of others. The Secretary of the Interior shall supply similar information, within a similar period of time, with respect to the claims of the United States to present perfected rights within each state. If the parties and the Secretary of the Interior are unable at that time to agree on the present perfected rights to the use of mainstream water in each state, and their priority dates, any party may apply to the Court for the determination of such rights by the Court."

Pursuant to Article VI, the State of Arizona, the State of California, and the Secretary of the Interior submitted the required lists in March of 1967. The State of Nevada, Intervener, asserted no non-federal present perfected rights.

The parties and the Secretary of the Interior were unable at that time to agree on the present perfected

rights to the use of mainstream water in each State and their priority dates; however, all agreed to continue discussions. At this time all parties except the United States and the impleaded defendants (who claim no present perfected rights) have agreed to the list of present perfected rights set forth in the Proposed Supplemental Decree. The Secretary of the Interior has refused to agree to said list, assertedly because the list would prejudice Indian water rights. This asserted ground is invalid because the state parties have agreed to the subordination language set forth at paragraph 5, on pages 4-6, of the Proposed Supplemental Decree submitted herewith. Hence no valid objection exists to the entry of a decree in the form submitted herein.

Complainant State of Arizona, defendant State of California and intervener State of Nevada, pursuant to the order of this Court in Article VI to (1) "furnish to this Court and to the Secretary of the Interior a list of the present perfected rights, with their claimed priority dates, in waters of the mainstream within each state, respectively in terms of consumptive use, . . ." and (2) to attempt to reach agreement on those rights and priority dates, have done so and agree to the list of present perfected rights and their priority dates as set forth in the Proposed Supplemental Decree. Arizona, California, and Nevada claim no interest in the present perfected rights listed therein other than to the extent the total of said rights contribute to their entitlement under the Opinion and Decree in this case.

II

**STATUS OF PROCEEDINGS CONDUCTED PURSUANT
TO ARTICLE VI OF THE DECREE ENTERED
MARCH 9, 1964, AND AMENDED ON FEBRUARY
28, 1966**

The Decree in this case was entered on March 9, 1964, and amended on February 28, 1966. Pursuant to the Decree, the States of Arizona and California and the Secretary of the Interior filed their separate lists of present perfected rights with this Court. Nevada filed a statement that it did not have non-federal present perfected rights. Because the parties whose lists were presented to the Court were not in agreement, discussions were commenced by the concerned parties.¹¹

In 1968, the above mentioned concerned parties established a fact-finding committee to review and analyze the difference in the various claims and to reach an agreement under the Decree. At that time the United States' position was that the committee would limit its consideration of facts to present perfected rights yet to be determined under Article VI of the Decree and would not concern itself with the rights already quantified under Article II of that Decree. The committee met throughout the period from 1968 into 1971, at which time the members of the committee agreed to the present perfected rights of the major claimants.

In 1971, the three States of Arizona, California and Nevada were prepared to present the present perfected rights of the major claimants to this Court by way of stipulation while continuing discussions as to the miscellaneous claims. However, the United States did not agree to the separation of claims.

¹¹As used herein, the term "concerned parties" refers to the moving parties and the United States.

In January 1973, after agreement on miscellaneous claims, the United States drafted a comprehensive stipulation with concurrence of all the concerned State parties¹² and the five Indian tribes holding present perfected rights. This proposed stipulation included the following language:

“This stipulation shall in no way affect future adjustments resulting from a determination relating to settlement of the Indian reservation boundaries referred to in Article II(D)(5) of the Decree. Likewise Article IX of the Decree is not affected by this stipulation of settlement.”

In July 1973, the United States placed an additional set of conditions on its approval of any stipulated judgment. As a result, the concerned State parties drafted proposed language changes in the stipulation to meet those additional conditions.

Thereafter, on several occasions, the United States delayed making a final decision on the stipulation to allow the Indian tribes additional time to study said stipulation, including factual investigations of both Indian and non-Indian present perfected rights claims. These delays totaled approximately two years.

In 1976, further meetings were held between the United States and the concerned State parties to resolve an issue raised by the United States on behalf of the Indian tribes. That issue was whether the United States' agreement to the stipulation previously proposed by it would prejudice Indian water rights. The United States asserted that the doctrine of relation-back, on which the priority dates of non-Indian present perfected

¹²The term “concerned State parties” refers to the moving parties.

rights claims were based, did not apply vis-a-vis federal establishments, such as Indian reservations. In response to the United States' concern and request, the concerned State parties agreed to subordinate all their major present perfected rights regardless of priority date to those of the Indian tribes. The Indian rights to be so advantaged were to include not only those already decreed by this Court, but also such additional present perfected rights as were thereafter established by decree or future stipulation that were based upon orders of the Secretary of the Interior enlarging boundaries of the Indian reservations listed in Article II(D) of the Decree in this case that had occurred since the date of said Decree and prior to submission of the stipulation. A new stipulation was drafted by the concerned State parties which those parties believed would satisfy all of the conditions of the United States. The United States then demanded the further condition that all parties would agree to additional quantified Indian water rights based on said boundary enlargements whether or not said secretarial orders proved to be legally valid.

The concerned State parties rejected this additional demand. California had opposed two major Indian boundary claims involving the Colorado River Indian Reservation and the Fort Mohave Indian Reservation during the trial of this case before the Special Master and the Master had found these claims invalid. The United States was now demanding that the concerned State parties, in effect, abandon the California position and concede water rights on these enlarged boundaries which they were convinced were invalid. The concerned State parties rejected this demand and by a January 19, 1977, letter from the Solicitor of the Department

of the Interior, the Secretary of the Interior then declined to agree to the proposed stipulation. No further discussions have occurred.

Because of the inability of the moving parties to obtain the agreement of the Secretary of the Interior, said parties therefore are moving this Court for a determination of present perfected rights pursuant to Article VI of the Decree in this case and for the entry of a supplemental decree.

III

THE SECRETARY OF THE INTERIOR HAS NO VALID BASIS FOR HIS REFUSAL TO AGREE TO THE LISTS OF PRESENT PERFECTED RIGHTS SET FORTH IN THE SUPPLEMENTAL DECREE SUBMITTED HEREWITH

A. The United States Has Attempted to Improperly Use Article VI to Gain Additional Water Rights

Article I(G) of the Decree issued by this Court in this case defines a "perfected right" as a water right:

"acquired in accordance with state law, which right has been exercised by the actual diversion of a specific quantity of water that has been applied to a defined area of land or to definite municipal or industrial works, and in addition shall include water rights created by the reservation of mainstream water for the use of federal establishments under federal law whether or not the water has been applied to beneficial use;"

Article I(H) defines "perfected rights" existing as of June 25, 1929, as "present perfected rights." There

are thus two categories of present perfected rights: (a) those acquired in accordance with state law as stated in the Decree, and (b) those created by the reservation of mainstream water by the federal government for use of federal establishments under federal law.

All present perfected rights relating to federal establishments, including a national recreation area, as well as five Indian reservations (the Colorado River, Fort Mohave, Cocopah, Chemehuevi and Yuma), are quantified in Article II(D) (1)-(6) of the Decree. The Indian reservation water rights are deemed reserved by the federal government as of the dates each of the five Indian reservations was established. Such rights are quantified in that article on the basis of the quantity of practicably irrigable acreage, and not on the basis of actual diversion or use as of June 25, 1929. Such rights would have a priority as of the respective date on which the federal government established each reservation. As present perfected rights, the Indian reservation water rights must thus be satisfied, even in times of water shortage, before any other claims except for the Mexican Treaty obligation and, in the absence of the subordination provisions of the Proposed Supplemental Decree, any other present perfected rights with earlier priority dates.

All other present perfected rights, that is, those acquired in accordance with state law, are not quantified in the Decree, but are addressed in Article VI thereof. In that article, this Court, in effect, directed that an attempt be made to settle the issue of present perfected rights by stipulation. That article requires the States of Arizona, California and Nevada to supply lists of present perfected rights and their claimed priority dates.

That article also directs the Secretary of the Interior to supply similar information with respect to the claims of the United States to present perfected rights within each state. This Court then set forth two methods by which this issue could be resolved: (1) by the agreement of the parties and the Secretary of the Interior, and (2) by motion to this Court.

As noted above, the present perfected rights of the federal reservations are quantified in Article II(D)(1)-(6) of the Decree, but that article does not indicate in what state those rights are to be exercised. However, Article II(B)(4) provides that: "Any mainstream water consumptively used within a state shall be charged to its apportionment, regardless of the purposes for which it was released." When interpreting Articles VI, II(B)(4), and II(D)(1)-(6) together it becomes obvious that this Court intended the Secretary of the Interior only to separate the present perfected rights quantified in Article II(D)(1)-(6) as to the respective states in which the rights were to be exercised. This was necessary because of Article II(B)(4). This interpretation becomes even more obvious when it is noted that the list of present perfected rights was to be submitted to the Court within two years, an extremely short period of time. It would not be logical to interpret the Decree to allow the Secretary of the Interior to submit *additional* present perfected rights claims for the United States within that period, when the present perfected rights of the United States had been just fully litigated and finally quantified in the Decree. Non-federal present perfected rights had not been either identified nor quantified. Obviously, the Decree contemplated that an attempt would be made within the

short period of time allowed to settle *only* those as yet unquantified present perfected rights based upon state law and not that the issue of the quantification of the United States' rights would be reopened.

The agreement of the Secretary of the Interior is also required by Article VI if the present perfected rights issue is to be settled by stipulation. This requirement was reasonable since the priority dates of the present perfected rights acquired under state law could affect the present perfected rights of the federal establishments. Therefore, once the Secretary was satisfied that the state-based claims were valid or that the rights of the federal establishments would not be affected, his reasons for not agreeing to the lists ceased to be reasonable or valid under the Decree.

Article VI of the Decree provides that: (1) the Secretary of the Interior supply a list of federal present perfected rights by state, and (2) his agreement is required to settle the issue without a determination by this Court of present perfected rights acquired under state law. However, the Departments of Justice and the Interior have used those provisions for purposes never intended by that article, that is, to enlarge the quantified rights listed in Article II(D)(1)-(5) to include water rights for additional land and to attempt to change the definition of practicably irrigable acreage upon which the federal rights were based.

B. The Indian Present Perfected Rights Are Legally Strengthened Rather Than Weakened by the Proposed Decree

The Proposed Supplemental Decree herein contains the following subordination language:

“(5) In the event of a determination of insufficient mainstream water to satisfy present perfected rights pursuant to Article II(B)(3) of said Decree, the Secretary of the Interior shall, before providing for the satisfaction of any of the other present perfected rights except for those listed herein as “MISCELLANEOUS PRESENT PERFECTED RIGHTS,” (rights numbered 7-21 and 29-80 below) in the order of their priority dates without regard to State lines, first provide for the satisfaction in full of all rights of the Chemehuevi Indian Reservation, Cocopah Indian Reservation, Colorado River Indian Reservation, and the Fort Mohave Indian Reservation as set forth in Article II(D)(1)-(5) of said Decree, plus such additional present perfected rights as are hereafter established by decree or future stipulation that are based upon orders of the Secretary of the Interior enlarging the boundaries of said reservations that have been issued between the date of said Decree and May 2, 1977. . . . Effect shall be given to this paragraph notwithstanding the priority dates of the present perfected rights as listed below. . . .”

It is clear from the above quoted subordination language and from the negotiation history outlined, that the determination of present perfected rights as set forth in the Proposed Supplemental Decree will not be legally adverse to the already decreed rights claimed by the United States nor would it have any adverse legal effect upon additional rights “established by decree or future stipulation that are based upon orders of the Secretary of the Interior enlarging the boundaries of said reservations that have been issued

between the date of said Decree and May 2, 1977." See pages 4-6 of the Proposed Supplemental Decree.

Indeed, the above quoted subordination language confers a legal benefit upon the United States in that it permits the federal government to have its quantified present perfected rights (and possibly even additional rights) satisfied before *any* major non-federal present perfected rights. This is so even though some of the major non-federal present perfected rights would have earlier priority dates than those of the federal rights even without applying the doctrine of relation-back.

Conclusion

As shown above, there remain no further issues to be determined under Article VI of the Decree in this case in that the moving parties are in agreement as to the present perfected rights and their priority dates and the United States will not be prejudiced by the entry of the Proposed Supplemental Decree.

Therefore, the moving parties hereby move this Court, pursuant to Article VI of said Decree, for a determination of present perfected rights in the waters of the mainstream of the Colorado River within each state and their priority dates as set forth in the Proposed Supplemental Decree and for the entry of the Proposed Supplemental Decree.

Dated: April 28, 1977.

Respectfully submitted,

State of Arizona,

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Arizona Water Commission,

By RALPH E. HUNSAKER,

State of California,

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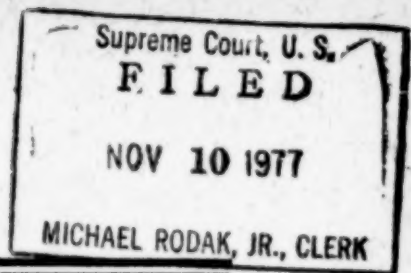
LYLE RIVERA,
Chief Deputy Attorney General,

BRIAN MCKAY,
Deputy Attorney General,

By LYLE RIVERA.

Service of the within and receipt of a copy
thereof is hereby admitted this day
of May, A.D. 1977.

No. 8, Original



In the Supreme Court of the United States

OCTOBER TERM, 1977

STATE OF ARIZONA, COMPLAINANT

v.

STATE OF CALIFORNIA, ET AL.

**RESPONSE OF THE UNITED STATES TO
THE JOINT MOTION FOR A DETERMINATION
OF PRESENT PERFECTED RIGHTS AND ENTRY
OF A SUPPLEMENTAL DECREE**

**WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.**

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 8, Original

STATE OF ARIZONA, COMPLAINANT

v.

STATE OF CALIFORNIA, ET AL.

*RESPONSE OF THE UNITED STATES TO
THE JOINT MOTION FOR A DETERMINATION
OF PRESENT PERFECTED RIGHTS AND ENTRY
OF A SUPPLEMENTAL DECREE*

The United States agrees that a Motion for Determination of present perfected rights is appropriate under Article VI of the decree entered in this case on March 9, 1964, 376 U.S. 340, and amended on February 28, 1966, at 383 U.S. 268. Article VI provides that if the parties are unable to agree "on the present perfected rights to the use of mainstream water in each State, and their priority dates, any party may apply to the Court for the determination of such rights by the Court." As stated by movants here, although the parties have now reached substantial accord on many points—including the subordination agreement incorporated in the movants' proposed supplemental decree—despite a concerted effort, they are unable to conclude a complete agreement regarding the present perfected rights.

1. The United States does not oppose the entry of the proposed supplementary decree provided that paragraphs 4 and 5 are modified as follows. Proposed paragraph 4 (Motion, p. 4) should be amended to provide that—

Any water right listed herein may only be exercised for beneficial uses.

The deletion of the qualifying term “reasonable” brings this provision into conformity with the discussion of the beneficial use restriction on the exercise of present perfected rights in this Court’s earlier opinion, 373 U.S. at 584, and in Article I(G) of the decree, 376 U.S. at 341. If the addition of the phrase “and reasonable” qualifies or limits the exercise of present perfected rights, its inclusion is unwarranted by either this Court’s opinion or its decree. And, if it adds nothing to the limitation “to beneficial” uses already recognized by this Court (376 U.S. at 341), it should be deleted to avoid ambiguity on this point.

Paragraph 5 (Motion, pp. 4-6) should be amended to read as follows:

(5) In the event of a determination of insufficient mainstream water to satisfy present perfected rights pursuant to Article II(B) (3) of said Decree, the Secretary of the Interior shall, before providing for the satisfaction of any of the other present perfected rights except for those listed herein as “MISCELLANEOUS PRESENT PERFECTED RIGHTS” (rights numbered 7-21 and 29-80 below) in the order of their priority dates without regard to State lines, first provide for the satisfaction in full of all rights of the Chemehuevi Indian Reservation, Cocopah Indian Reservation, Yuma Indian Reservation, Colorado River Indian Reservation, and the Fort Mojave Indian Reservation as set forth in Article II(D) (1)-(5) of said Decree, *provided that the quantities fixed in*

paragraphs (1) through (5) of Article II (D) of said Decree shall continue to be subject to appropriate adjustment by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined. Additional present perfected rights so adjudicated by such adjustment shall be in annual quantities not to exceed the quantities of main stream water necessary to supply the consumptive use required for irrigation of the irrigable acres which are included within any area determined to be within a reservation by such final determination of a boundary. The foregoing reference to a quantity of water necessary to supply consumptive use required for irrigation, and as that provision is included within paragraphs (1) through (5) of Article II(D) of said Decree, shall constitute a means of determining quantity of adjudicated water rights but shall not constitute a restriction of the usage of them to irrigation or other agricultural application. The quantities of such diversions are to be computed by determining net practicably irrigable acres within each additional area using methods set forth by the Special Master in this case in his Report to this Court dated December 5, 1960, and by applying the unit diversion quantities thereto, as listed below:

Indian Reservation	Unit Diversion Quantity Acre-feet Per Irrigable Acre
Cocopah (Arizona)	6.37
Colorado River (California)	6.67
Chemehuevi (California)	5.97
Ft. Mojave (California)	6.46

Effect shall be given to this paragraph notwithstanding the priority dates of the present perfected rights as listed below. However, nothing in this paragraph (5) shall affect the order in which such rights listed below as "MISCELLANEOUS PRESENT PERFECTED RIGHTS" (rights numbered 7-21 and 29-80 below) shall be satisfied. Furthermore, nothing in this paragraph shall be construed to determine the order of satisfying any other Indian water rights claims not herein specified.

The amendment proposed by the United States (indicated in *italics*)¹ follows the language of the prior opinions and orders of this Court, and eliminates certain undesirable limitations on the subordination provision proposed by movants.

The proposed amendment incorporates the language of Article II(D)(5) of the decree entered on March 9, 1964 (376 U.S. at 345), which provides that the quantities adjudicated to certain reservations "shall be subject to appropriate adjustment by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined." The version proposed by movants, in contrast, applies only to additional present perfected rights based upon "orders of the

¹The following language contained in the movants' proposed supplemental decree has been deleted:

plus such additional present perfected rights as may be hereafter established by decree or future stipulation that are based upon orders of the Secretary of the Interior enlarging the boundaries of said reservations that have been issued between the date of said Decree and May 2, 1977. However, such additional rights to diversions of mainstream water shall not exceed the quantities necessary to supply the consumptive use required for irrigation of the additional practicably irrigable acres within the additional areas resulting from the enlarged boundaries. [Motion, p. 5].

Secretary of the Interior enlarging the boundaries of said reservations." That language is objectionable, first, because the Secretary of the Interior is not seeking to "enlarge" these reservations by order, although with respect to these disputes he may make determinations of what was intended by prior orders, statutes or treaties establishing reservations. More importantly, the boundary disputes covered by this provision should not be limited to those involving Secretarial orders. For example, one matter specifically discussed by the parties during negotiations related to a boundary dispute involving the Cocopah Reservation. The Cocopah sued the Secretary of the Interior for a determination that certain described lands immediately adjacent to the Colorado River in Arizona were held by the United States in trust for the tribe. That litigation, *Cocopah Tribe v. Morton*, No. CV-70-573-PHX-WEC, decided May 12, 1975 (D.C. Ariz.), resulted in a decision for the tribe. Similarly, litigation on behalf of the Colorado River Tribe has resulted in determinations that substantial parcels of land in California, which were discussed by the Special Master in this case, contrary to his recommendations, are a part of the Colorado River Reservation. The amendatory language proposed by the United States applies to cases such as these, as well as those involving only Secretarial orders.

The amended paragraph proposed here also eliminates the language limiting the claims covered by the subordination clause to those based upon a determination of the Secretary prior to May 2, 1977. The prior discussions and partial agreements between the parties did not contemplate that the scope of the subordination should be so limited, and we know of no basis for imposing such a restriction.

2. The United States does, however, oppose the entry of the proposed supplemental decree without the amendments discussed above, and recommends the appointment of a special master to determine the present perfected rights. The United States has no objection to the dates of priority and amounts of annual diversion allowed in the proposed decree for the various state water districts and projects, if they are part of a comprehensive stipulation effecting a complete settlement. However, if the amendments proposed above are not made and thus no agreement satisfactory to the United States is reached, the United States is entitled to require a showing of the proofs that support the claims to which it gave tentative approval as part of an overall settlement.

The United States urges that the Motion for a Determination be granted, and that the Supplemental Decree proposed by the movants, amended in accordance with the proposals in this response, be entered by the Court. In the alternative, the United States recommends that this matter be assigned to a special master for a hearing.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

NOVEMBER 1977.

DEC 23 1977

No. 8 Original

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

STATE OF ARIZONA,

v.

Complainant

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT,
IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY
COUNTY WATER DISTRICT, METROPOLITAN WATER DIS-
TRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES,
CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND
COUNTY OF SAN DIEGO, CALIFORNIA,

Defendants

THE UNITED STATES OF AMERICA AND STATE OF NEVADA,
Interveners

STATE OF UTAH AND STATE OF NEW MEXICO,
Impleaded Interveners

**MOTION FOR LEAVE TO INTERVENE AS
INDISPENSIBLE PARTIES BY THE FORT MOJAVE
INDIAN TRIBE, THE CHEMEHUEVI INDIAN TRIBE,
AND THE QUECHAN TRIBE OF THE FORT YUMA
INDIAN RESERVATION; JOINED IN BY THE
NATIONAL CONGRESS OF AMERICAN INDIANS AS
AMICUS CURIAE**

RAYMOND S. SIMPSON, Attorney for
The Fort Mojave Tribe of Indians,
The Chemehuevi Indian Tribe, and
The Quechan Tribe of the Fort Yuma
Indian Reservation

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 8 Original

STATE OF ARIZONA,
Complainant

v.

STATE OF CALIFORNIA, ET AL.,
Defendants

UNITED STATES OF AMERICA,
Intervener

**MOTION FOR LEAVE TO INTERVENE AS
INDISPENSIBLE PARTIES BY THE FORT MOJAVE
INDIAN TRIBE, THE CHEMEHUEVI INDIAN TRIBE,
AND THE QUECHAN TRIBE OF THE FORT YUMA
INDIAN RESERVATION; JOINED IN BY THE
NATIONAL CONGRESS OF AMERICAN INDIANS AS
AMICUS CURIAE**

The Fort Mojave Indian Tribe, the Chemehuevi Indian Tribe, and the Quechan Tribe of the Fort Yuma Indian Reservation, hereafter referred to as the Tribes, do collectively and individually move this Court for leave to file a petition of intervention upon the following grounds and for the following reasons.

I.

TRIBES ARE REAL PARTIES IN INTEREST

There was filed with the Court on May 3, 1977, a "Joint Motion for a Determination of Present Perfected Rights and the Entry of A Supplemental Decree; Proposed Supplemental Decree; and Memorandum in Support of Proposed Supplemental Decree," hereafter referred to as the Joint Motion.

II.

On November 10, 1977, there was filed with this Court by the Solicitor General, Department of Justice, a "Response of the United States to the Joint Motion for a Determination of Present Perfected Rights and Entry of a Supplemental Decree," hereafter referred to as the Response.

III.

The Tribes are owners of full equitable title in and to "present perfected rights" in the Colorado River, which are set forth in the Court's Decree entered March 9, 1964, Article II D(1)-(5). Those "present perfected rights" are directly and immediately affected by both the Joint Motion and the Response. The Tribes are, therefore, the real parties in interest in regard to the "present perfected rights" referred to in both the Joint Motion and the Response (see Joint Motion, page 6, paragraph I A; see Response, pages 2-6). The Tribes, moreover, assert priorities' from time immemorial.

IV.

On July 16, 1976, all as authorized by Congress,¹ the Fort Mojave Tribe, a movant here, requested the Secretary of the Interior to allow representation in *Arizona v.*

¹ P.L. 93-632, Act of January 4, 1975, 88 Stat. 2203; 25 U.S.C. 450f.

California independent from the Solicitor General. On November 14, 1977, the Secretary of the Interior denied the Mojave request. On November 21, 1977, the Fort Mojave Tribe rejected the representation of the Solicitor declaring it would not be bound by his actions in *Arizona v. California*. (See Appendix A.)

In response, the Solicitor General, on December 2, 1977, advised that the Tribes would be bound by his actions. On December 14, 1977, the Court requested replies from the States to the Response of the United States. On December 16, 1977, the Solicitor General was advised by the Tribes as follows:

Referring to the mailgram dated November 21, 1977, in which the undersigned advised you that your Response to the Joint Motion in *Arizona v. California* would not be binding on the Tribes involved. That rejection is hereby reiterated and reaffirmed. Not only has that representation been grossly inadequate, owing to your inherent conflict of interest, to protect the interests of the Tribes, but your insistence that the Tribes be bound by your representation, as stated in your reply to our mailgram, is clearly violative of your trust obligation, the property rights of the Tribes, and their own civil rights. Any effort to bind the Tribes by your actions will be strongly resisted. (See Appendix A)

On that background, the Tribes have filed this motion and brief in support.

V.

Due to the time constraints confronting the Tribes, there has been insufficient time to properly prepare a complete petition of intervention. Hence, the Court is respectfully requested to consider the content of the Motion and supporting briefs as a basis for allowing intervention. If granted, a full petition of intervention will be filed with the Court within sixty (60) days.

VI.

**IMPERATIVE NEED TO HAVE RESOLVED
ALL ISSUES IN ARIZONA v. CALIFORNIA**

A protracted delay of thirteen years in resolving the issue of "present perfected rights" of the parties in *Arizona v. California* has occurred since the entry of the Final Decree on March 9, 1964. That delay has ensued due very largely to the conflicts of interest of the Secretary of the Interior. The Decree originally entered provided that a list of "present perfected rights" would be submitted to the Court at the end of a two-year period. Since that time, there have been continued negotiations in an effort to resolve the conflict between the claims and "present perfected rights" of the Indians and those of the defendants in this cause.

VII.

Both the Joint Motion and Response, while purportedly resolving the alleged "present perfected rights" of the movants here, leave unresolved a final determination of the "present perfected rights" of the Tribes and, indeed, all "present perfected rights" on the Lower Colorado River. Unless and until the full "present perfected rights" of the Indians can be resolved, there will be no way of determining the measure of the "present perfected rights" of other parties in and to the waters of the Lower Colorado River.

VIII.

The economy of the time of this Court, of the parties and numerous claimants to rights to the use of water and "present perfected rights" in the Lower Colorado River will be adversely affected by the failure to require the disposition in a single proceeding of all pending issues. Continued delay in resolving all of the Tribes' "present perfected rights," as contemplated by the Joint Motion

and Response, will cause irreparable damage and continuing irreparable damage to the Tribes which are already experiencing that damage due to the procrastination in concluding the case of *Arizona v. California*. Without final determination of the long-festering and contentiously disputed "present perfected rights" between the Tribes and the non-Indians, the struggle that prevails today will be greatly increased. There is an imperative need that this Court direct that steps be taken forthwith to conclude all of the disputes. Piecemeal resolution of those issues as contemplated by the Joint Motion and Response must, of necessity, be rejected.

IX.

It is respectfully submitted that neither the Joint Motion nor the Response will have any other effect than greatly to delay the final resolution of the contentious conflicts that are now ongoing, calling for the rejection of both the Joint Motion and the proposed resolution as contained in the Response.

X.

For the Tribes to be forced to accept the false claims of the joint movants to "present perfected rights" without their own being resolved is a product of the all pervasive conflict of interests within the Interior and Justice Departments and a violation by those departments of their trust responsibilities. The Tribes naturally desire the joint movants to subordinate their claimed "present perfected rights" to the Tribes. An effective subordination can and will be prepared by the Tribes. That the proposed subordination in the Joint Motion falls far short of an effective subordination is clear beyond question.

**PATENT AMBIGUITIES IN
"PROPOSED SUPPLEMENTAL DECREE"**

XI.

There are patent ambiguities in the "Proposed Supplemental Decree" particularly in regard to the alleged subordination of the movants' "present perfected rights" to those "present perfected rights," title to which resides with the Tribes.² As set forth in the "Proposed Supplemental Decree," it is declared:

*"(5) In the event of a determination of insufficient mainstream water to satisfy present perfected rights pursuant to Article II(B)(3) of said Decree, the Secretary of the Interior shall, before providing for the satisfaction of any of the other present perfected rights * * * first provide for the satisfaction in full of all rights of the Chemehuevi Indian Reservation, Cocopah Indian Reservation, Yuma Indian Reservation, Colorado River Indian Reservation, and the Fort Mojave Indian Reservation as set forth in Article II(D)(1)-(5) of said Decree. . . ." (Emphasis supplied)*

XII.

Reference is respectfully made to the language of Article II(B)(3) of this Court's Decree which provides

"If insufficient mainstream water is available for release, as determined by the Secretary of the Interior, to satisfy annual consumptive use of 7,500,000 acre-feet in the aforesaid three States, then the Secretary of the Interior, after providing for satisfaction of present perfected rights in the order of their priority dates without regard to state lines and after consultation with the parties to whom major delivery contracts and such representatives as the respective

² See p. 3, "Proposed Supplemental Decree," pp. 4-5, para. 5.

States may designate, may apportion the amount of remaining available water for consumptive use in such manner as is consistent with the Boulder Canyon Project Act as interpreted by the opinion of this Court herein. . . ."³ (Emphasis supplied)

XIII.

There is not to be found in Article II(B)(3) any reference to an insufficient supply of mainstream water to satisfy "present perfected rights." Rather, there is provision for the "satisfaction of present perfected rights." As a consequence, there is a clear patent ambiguity between the "Proposed Supplemental Decree" and the Decree that has already been entered by this Court. By reason of that patent ambiguity, there is most certainly a conflict calling for further additional litigation. Thus, rather than resolving the disputes over "present perfected rights," that ambiguity will cause great stress and hardship to the Tribes. They are now using water upon lands which they have brought under irrigation subsequent to the date of the entry of the Decree in 1964.

XIV.

Irrespective of the aforesaid patent ambiguity in the "Proposed Supplemental Decree"—and with full knowledge of it—all as set forth above, the Solicitor General accepted the patent ambiguity in these terms:

"As stated by movants here, although the parties have now reached substantial accord on many points—including the subordination agreement incorporated in the movants' proposed supplemental decree —. . . ."⁴

³ 376 U.S. 340, 342, Article II(B)(3).

⁴ See "Response of the United States to Joint Motion for a Determination of Present Perfected Rights and Entry of a Supple-

XV.

An additional patent ambiguity appears in the "Proposed Supplemental Decree."⁵ It is there declared that any additional rights to the use of water for lands included within the reservation by reason of resolution of boundary disputes will be entitled to mainstream water which shall not exceed the quantities "necessary to supply consumptive use required for irrigation of additional, practicably irrigable acreage within the additional acres resulting from the enlarged boundaries."

XVI.

The language of the "Supplemental Decree," in the paragraph immediately preceding, does not comport with the language of Article II(D)(1)-(5) of the Decree entered by this Court. In that Article, it is provided, among other things, that the Indian reservations will have entitlements to "present perfected rights" as follows:

"... in annual quantities not to exceed (i) ... acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of ... acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with a priority date of ..."

Both the Joint Motion and the Response filed by the Solicitor General do not comport with the language quoted from Article II(D)(1)-(5). Rather, they provide

mental Decree," filed November 10, 1977, by Wade H. McCree, Jr., Solicitor General, Department of Justice, Washington, D.C. 20530, p. 1.

⁵ Joint Motion, p. 3, pp. 4-5, paragraph 5.

"... mainstream water shall not exceed the quantities necessary to supply the consumptive use required for irrigation of practicably irrigable acreage. . . ."

leaving lands within the reservations with differing criteria for measuring their "present perfected rights."

XVII.

The Tribes are necessarily gravely concerned over the patent ambiguities contained in the Joint Motion, which patent ambiguities have been approved by the Solicitor General, Department of Justice. For this Court to adopt the "Supplemental Decree" with the language setting forth the patent ambiguities is to invite continuing conflicts in the Lower Colorado River between the Indian Tribes and the other adverse claimants to water from the Colorado River. Rather than resolving conflicts, the adoption of the "Proposed Supplemental Decree," as accepted by the Solicitor General, will create continuing and never-ending conflicts among the water users on the Lower Colorado River to their irreparable damage.

XVIII.

FAILURE OF RESPONSE TO PRESENT CORRECT STATUS OF BOUNDARY DISPUTES

Failure in the Response to correctly and fully advise this Court relative to the status of boundary claims of the Tribes falls far short of responsibility owing to this Court and the fulfillment of the fiduciary obligation owing to the Tribes by the National Government. Reference in that regard is made to the correct status of the boundary disputes on the several reservations.

* Joint Motion, "Supplemental Decree," paragraph 5; Response to Joint Motion filed by the Solicitor General, p. 3.

A. Fort Mojave Indian Reservation

On June 3, 1974, the Secretary of the Interior declared ". . . null and void and to have no further force and effect" the survey which established the western boundary of the Hay and Wood Reserve of the Fort Mojave Indian Reservation. That survey was approved November 15, 1930, and accepted January 23, 1931, by the Department of the Interior.⁷

XIX.

By that Secretarial Order, dated June 3, 1974, the conflict over the western boundary of the Hay and Wood Reserve of the Fort Mojave Indian Reservation, referred to by the Special Master in *Arizona v. California* in his report dated December 5, 1960, was finally determined.⁸

XX.

By the Secretarial Order of June 3, 1974, an additional, approximately 3580 acres of irrigable lands were recognized as being part of the Hay and Wood Reserve of the Fort Mojave Indian Reservation. Approximately 1500

⁷ See Appendix B, Memorandum entitled "Western Boundary of the Hay and Wood Reserve of the Fort Mojave Indian Reservation, Arizona, California and Nevada," which Memorandum was from the Secretary of the Interior to the Bureau of Land Management.

See the Memorandum dated June 3, 1974, entitled "Location of the Western Boundary of the Hay and Wood Reserve Portion of the Fort Mojave Indian Reservation." That Memorandum is from the Solicitor of the Department of the Interior to the Secretary of the Interior. Pursuant to that Solicitor's Memorandum, the aforesaid Memorandum of the Secretary of the Interior, establishing the new western boundary of the Hay and Wood Reserve for the Fort Mojave Indian Reservation, was entered.

⁸ Report of Special Master, *Arizona v. California*, December 5, 1960, pp. 279 *et seq.* That aspect of the Report of the Special Master was rejected by this Court in its opinion of *Arizona v. California*, 373 U.S. 546, 601 (1963).

acres of those additional lands are presently irrigated. Those lands, now being part of the Hay and Wood Reserve of the Fort Mojave Indian Reservation, are entitled to have decreed to them "present perfected rights" with a priority of September 19, 1890, all as provided in the Final Decree, Article II (D) (5).

XXI.

Those irrigable acres are entitled to a diversion duty of 6.46 acre-feet for each acre of irrigable land, as part of the "present perfected rights" of the Fort Mojave Indian Reservation.

B. Colorado River Indian Reservation—Colorado River Tribes Not A Party To This Motion

1. *State of California Benson Line Area*

On January 17, 1969, the Secretary of the Interior, in the exercise of that official's plenary power to establish boundary lines to lands, title to which resides in the United States and the Indian reservations, entered an order which established the western boundary of the Colorado River Indian Reservation "from the top of Riverside Mountain, California, through section 12, T. 5 S., R. 23 E., S.B.M., California."

* See the Memorandum from the Secretary of the Interior, which is dated January 17, 1969, to the Director, Bureau of Land Management Through: Assistant Secretary, Public Land Management, entitled "Western boundary of the Colorado River Indian Reservation from the top of Riverside Mountain, California, through section 12, T. 5 S., R. 23 E., S.B.M., California." That Secretarial Memorandum was predicated upon a Memorandum from the Solicitor to the Secretary of the Interior which is entitled "Western boundary of the Colorado River Indian Reservation from the top of Riverside Mountain, California, through section 12, T. 5 S., R. 23 E., S.M.B., California."

Since the Secretarial Order of January 17, 1969, there have been two cases brought in the Federal District Court involving portions of that Secretarial boundary. They are:

XXII.

By that Secretarial Order, the boundary line that had been previously doubtful has very largely been permanently established. Moreover, the Secretarial Order recognized that approximately 4,000 acres of land were within the Colorado River Indian Reservation. Of that total, approximately 3,673 acres are irrigable in character, part of which are now irrigated. Those additional lands are entitled to have decreed to them "present perfected rights." They must have a diversion duty of 6.67 acre-feet for each acre of irrigable land.

2. *Colorado River Indian Reservation-State of California South of Benson Line*

A segment of the western boundary line of the Colorado River lying south of the Benson Line remains undetermined. Those lands are situated in Townships 5 and 6, Range 23 East, S.B.M. Irrigated and irrigable lands, owned by the Tribes and entitled to "present perfected rights" in the Colorado River, are situated within that area.

XXIII.

Every effort is now being made by the Tribes acting on their own behalf to have that boundary line determined to the end that those lands can have decreed to them their "present perfected rights," vis-a-vis the movants.

United States v. Samuel Curtis, et ux. Final Judgment entered January 7, 1977, declaring that title to the disputed lands to be in the United States in trust for the Colorado River Tribes.

United States v. Brigham Young, et al. Judgment entered in five (5) parts on December 12 and 13, 1976, and on April 6, 1977. This is a Final Judgment. That Judgment declares that the ownership of the disputed land to be in the United States in trust for the Colorado River Tribes.

3. Colorado River Indian Reservation—State of Arizona

There are two areas in the Colorado Indian Reservation which were originally in the State of Arizona but due to avulsive action of the Colorado River are now situated west of that stream and in the State of California. Those two areas are respectfully known as the Ninth Avenue Cut-Off and the Olive Lake Cut-Off.

a. Ninth Avenue Cut-Off

(1) There are 220 acres of land within the Ninth Avenue Cut-Off entitled to have decreed to them "present perfected rights." Those lands have an annual diversion duty of 6.67 acre-feet of water for each acre of land within the Ninth Avenue Cut-Off.

(2) All previous conflicts respecting the title of the Colorado River Tribes to the Ninth Avenue Cut-Off lands have been resolved.

b. Olive Lake Cut-Off

(1) There are 2,058 acres of irrigable and irrigated lands within the Olive Lake Cut-Off for which the Colorado River Tribes are entitled to have decreed to them "present perfected rights" in the Colorado River. Those lands have an annual diversion duty of 6.67 acre-feet for each acre of land within the Olive Lake Cut-Off.

(2) A Final Judgment was entered February 19, 1977, declaring that title to the 2,058 acres within the Olive Lake Cut-Off resides in the United States in trust for the Colorado River Tribes. That Judgment has been appealed and is now pending in the United States Court of Appeals.¹⁰

¹⁰ United States v. Aranson et al.

**C. Cocopah Indian Reservation—Cocopah Tribe
Not A Party To This Motion**

There was entered on May 12, 1975, a stipulated Final Judgment pursuant to which the Cocopah Indian Reservation boundary was resolved.¹¹ By that stipulated Judgment, it was recognized by the Court that there are an additional 883.53 acres of land, more or less, which are part of the Cocopah Indian Reservation. The Cocopah Indian Tribe is entitled to have decreed to it "present perfected rights" in the Colorado River for the lands in question. For those lands, there is an annual diversion duty for each acre of 6.37 acre-feet of water from the Colorado River.

D. Chemehuevi Indian Reservation

By a Secretarial Order dated August 15, 1974, pertaining to the boundary of the Chemehuevi Indian Reservation, it was determined that the reservation encompassed an additional 150 acres of irrigable land.¹² The diversion duty for those 150 acres is at the rate of 5.97 acre-feet for each acre of irrigable land.

XXIV.

**TITLE TO LANDS RESIDING IN
QUECHAN INDIAN TRIBE**

There has been omitted by the Solicitor General from the Response to the Joint Motion any reference to the Quechan Tribe issue which is directly and immediately involved in the issue of "present perfected rights" in the Colorado River.

¹¹ Cocopah Tribe of Indians v. Rogers C. B. Morton, Secretary of the Interior of the United States of America, in the United States District Court for the District of Arizona, Civil No. 70-573-PHX-WEC.

¹² Appendix C, Order of the Secretary of the Interior dated August 15, 1974, with the subject of the Memorandum entitled "Title to Certain Lands Riparian to Lake Havasu."

XXV.

On May 24, 1977, at a meeting with the Solicitor, Department of the Interior, that official gave assurances to the leaders of the Quechan Tribe occupying the Fort Yuma Indian Reservation that there would be an early determination of long-pending issues relative to the title of the Quechan Tribe to the last-mentioned Indian reservation. Since that date, the Quechan Indian Tribe has had no further information from the Solicitor in regard to the all-important issue. Failure of the Solicitor General to include any reference to the Quechan title in the Response to the Joint Motion can do irreparable damage to the Quechan Tribe.

XXVI.

There is an imperative necessity that prior to any action being taken on the Joint Motion, there be resolved this issue as to the title of the Quechan. Involved is a substantial area of highly valuable land entitled to have decreed to it "present perfected rights" in the Colorado River. Each acre of those irrigable lands is entitled annually to 6.67 acre-feet per acre from the Colorado River.¹³

XXVII.

**INDIAN IRRIGABLE ACREAGE ENTITLED TO
"PRESENT PERFECTED RIGHTS" FOR WHICH
NO CLAIMS WERE MADE IN ARIZONA v. CALIFORNIA**

It has been determined by the Bureau of Indian Affairs, Department of the Interior, that there was a failure on the part of the Department of Justice in the hearing before the Special Master in *Arizona v. California* fully to present on behalf of the Indian Tribes all of the irrigable

¹³ Final Decree, Article II(D) (3).

acreage to which the Tribes are entitled to have decreed to them "present perfected rights."

XXVIII.

In the hearing before the Special Master, there was a failure to assert on behalf of the five Tribes "present perfected rights" for 51,253.26 acres which the Tribes were entitled to have decreed to them in *Arizona v. California*.

XXIX.

There follows a tabulation setting forth the irrigable acreage in each reservation for which no claim was asserted for "present perfected rights" before the Special Master in *Arizona v. California*.

Yuma	5,282.32	Irrigable Acres
Chemehuevi	2,367.32	" "
Cocopah	1,175.27	" "
Colorado River	38,769.16	" "
Fort Mojave	3,550.34	" "
Parker Townsite	108.85	" "

51,253.26 Total Irrigable Acres

The tabulated "present perfected rights," as set forth in the Joint Motion, are gravely deficient, failing to set forth the full entitlement to "present perfected rights" for which title resides in the Tribes. That Joint Motion fails to disclose and the Response fails to set forth the proper irrigable acreage for which the Tribes, in both the State of Arizona¹⁴ and the State of California¹⁵ are entitled.

¹⁴ Joint Motion, p. 6, Arizona, 1A.

¹⁵ Joint Motion, p. 11, II California.

XXX.

Irreparable damage will be experienced by the Tribes if the Joint Motion, as responded to by the Solicitor General, is granted. The effect of the issue as joined by the Response to the Joint Motion will result in the Tribes being denied "present perfected rights" for large areas both within the areas of boundary disputes and likewise within the areas for which there was a failure to assert "present perfected rights." Additionally, the patent ambiguities in the Joint Motion will contribute to the historic conflicts of "present perfected rights" between the Indians and the non-Indians.

XXXI.**DENIAL BY TRIBES OF CLAIMS OF MOVANTS**

The Tribes, acting collectively and individually, specifically deny the asserted claims set forth in the Joint Motion on behalf of the Palo Verde Irrigation District;¹⁶ the Imperial Irrigation District;¹⁷ the Reservation Division, Yuma Federal Reclamation Project, California;¹⁸ the Valley Division, Yuma Federal Reclamation Project;¹⁹ the Yuma Auxillary Project, Unit B;²⁰ and the North Gila Valley Unit, Yuma Mesa Division, Gila Project.²¹

XXXII.

The Solicitor General, by conditionally acknowledging the "present perfected rights" of the aforesaid irrigations and projects, gravely threatens the Tribes, collectively and individually, with irreparable and continuing damage.

¹⁶ Joint Motion, p. 11.

¹⁷ Joint Motion, p. 12.

¹⁸ Joint Motion, p. 12.

¹⁹ Joint Motion, p. 6.

²⁰ Joint Motion, p. 6.

²¹ Joint Motion, p. 7.

XXXIII.

The Tribes will prove, if permitted to do so by this Court, that the "present perfected rights," asserted by each of the above-named movants and conditionally approved by the Response filed by the Solicitor General, are in error as to dates of priority, acreage and quantities of water, all as set forth in the Joint Motion.

The National Congress of American Indians, the largest organization of Indian Nations and Tribes in the United States, is fully acquainted with the grave threat to the Tribes due to the course of conduct adhered to in the case of *Arizona v. California* by both the Departments of Interior and Justice. It has consistently supported the Tribes in their efforts to protect their invaluable "present perfected rights" to the use of water in the Lower Colorado River. The National Congress of American Indians joins the Tribes, as *amicus curiae*, in their motion to file with this Court a petition of intervention and joins them in the brief filed in support of that motion.

WHEREFORE, the Fort Mojave Indian Tribe, the Chemehuevi Indian Tribe, and the Quechan Tribe of the Fort Yuma Indian Reservation, individually and collectively, and the National Congress of American Indians, as *amicus curiae*, respectfully pray this Court as follows:

1. To permit the Tribes individually and collectively to file, within sixty (60) days after the grant of this motion, a petition to intervene in the case and to represent themselves, individually and collectively, as distinguished from the representation of the Solicitor General.

2. To refrain from granting the Joint Motion or from granting any relief prayed for in that Joint Motion.

Respectfully submitted,

(DATE)

RAYMOND S. SIMPSON, Attorney for
The Fort Mojave Tribe of Indians,
The Chemehuevi Indian Tribe, and
The Quechan Tribe of the Fort Yuma
Indian Reservation

2032 Via Visalia

Palo Verdes Estates, CA 90274

*Attorney for the National Congress
of American Indians, Amicus Curiae*



APPENDIX A

Mailgram to President Jimmy Carter; Solicitor General Wade McCree, Jr., Justice Department; Secretary Cecil Andrus, Interior Department; Under Secretary James Joseph, Interior Department; Assistant Secretary for Indian Affairs Forrest Gerard, Interior Department from Veronica L. Murdock, President, National Congress of American Indians, Llewellyn Barrackman, Chairman, Confederation of Indian Tribes of the Lower Colorado River, Norvin McCord, Chairman, Fort Mojave Tribe, Frank McCabe, Chairman, Colorado River Tribes.

Letter accompanying the aforementioned mailgram from Charles E. Trimble, Executive Director, National Congress of American Indians, 22 November 1977.

Letter to Veronica L. Murdock, President, National Congress of American Indians, from Wade H. McCree, Jr., Solicitor General, Justice Department, undated.



1a

THIS MAILGRAM IS A CONFIRMATION COPY OF
THE FOLLOWING MESSAGE:

2024663890 MGM TDMT WASHINGTON DC 262 11-21
0417P EST

ZIP

WADE H. McCREE, JR.
SOLICITOR GENERAL
OFFICE OF THE SOLICITOR GENERAL
DEPT OF JUSTICE
WASHINGTON DC 20503

PLEASE TAKE NOTICE THAT THE CONFEDERATED TRIBES OF THE LOWER COLORADO RIVER CANNOT AND WILL NOT CONSENT TO THE CONTINUED IMPOSITION OF PROPOSED REPRESENTATION ON THEIR BEHALF IN THE CASE OF ARIZONA V CALIFORNIA BY THE DEPARTMENT OF JUSTICE, THE TRIBES, COMPOSING THE CONFEDERATION, REFUSE TO BE BOUND BY THE REPOSENSE THAT HAS BEEN FILED BY THE SOLICITOR GENERAL TO THE JOINT MOTION BEFORE THE SUPREME COURT, THE SUPREME COURT SHOULD BE INFORMED BY THE SOLICITOR GENERAL OF THAT REFUSAL AND THAT THE TRIBES WILL NOT BE BOUND BY THE ACTION TAKEN THERE. MOREOVER, THE SUPREME COURT SHOULD BE ACCORDINGLY ADVISED WELL IN ADVANCE OF THAT FACT TO AVOID THE COURT TAKING ACTION BASED UPON THE PENDING JOINT MOTION AND RESPONSE. THEY ARE SHOCKED BY THE REJECTION OF THEIR CLAIM THAT THEY ARE ENTITLED TO WATER FROM TIME IMMEMORIAL AS OPPOSED

2a

TO A DATE WHICH MAKES THEM JUNIOR TO THE PUBLIC CLAIMS BY THE IRRIGATION DISTRICTS INVOLVED. THEY ARE FURTHER DISMAYED BY THE DISREGARD OF THE FACT THAT THEY ARE NOT ASSURED THAT THEY WILL HAVE SUFFICIENT WATER TO CONTINUE THE ECONOMIC DEVELOPMENT OF CERTAIN PORTIONS OF THEIR RESERVATIONS WHICH HAVE BEEN INVOLVED IN BOUNDARY DISPUTES. HENCE, WITH THE ABOVE IN MIND, THE TRIBES MUST AND DO HEREBY REQUEST THAT THE UNITED STATES IN ITS CAPACITY OF TRUSTEE TAKE IMMEDIATE STEPS TO SUPPORT A POSITION FOR INTERVENTION BY THE SAID TRIBES AS INDISPENSABLE PARTIES AND THAT THE SECRETARY OF THE INTERIOR FORTHWITH MAKE SUFFICIENT FUNDS AVAILABLE TO THE CONFEDERATED TRIBES FOR INDEPENDENT LEGAL PROSECUTION OF THEIR TRUE POSITION WITHOUT FURTHER DELAY.

VERONICA L MURDOCK PRESIDENT
NATIONAL CONGRESS OF AMERICAN INDIANS
LLEWELLYN BARRACKMAN CHAIRMAN
CONFEDERATION OF INDIAN TRIBES OF
COLORADO RIVER
NORWIN MC CABE CHAIRMAN
FORT MAJAVE TRIBE

PAGE 2

WESTERN UNION MAILGRAM

[SEAL]

FRANK CABE JR CHAIRMAN
COLORADO RIVER INDIAN TRIBES

17:04 EST

MGMCOMP MGM

[SEAL]

NATIONAL CONGRESS OF AMERICAN INDIANS

Suite 700, 1430 K Street, N.W., Washington, D.C. 20005
(202) 347-9520

November 22, 1977
Mr. Wade H. McCree, Jr.
Solicitor General
Office of the Solicitor General
Department of Justice
Washington, D.C. 20503

Subject: Rejection of Representation by the Solicitor
General in *Arizona v. California*.

Dear Mr. McCree:

There was submitted to you yesterday, 21 November 1977, a mailgram, a copy of which is attached. In that mailgram, the Solicitor General is advised that the Indian Tribes of the Lower Colorado River refused to be further represented by that official in regard to the Joint Motion, filed May 3, 1977, now pending before the Supreme Court. Those Tribes, moreover, assert that they will not be bound by the Response to the Joint Motion filed by the Solicitor General, November 10, 1977, believing it to be greatly deficient and, indeed, totally inadequate. The Tribes there-involved further request that the Supreme Court be advised forthwith of the content of the mailgram. A different course will result in irreparable damage to them if the Court should take action granting the Joint Motion or any relief claimed therein.

The National Congress of American Indians supports the Tribes in the action taken by them and, indeed, join them in signing the mailgram. It is believed that the Solicitor General, having been fully advised of the opposition of the Tribes to the Response which was filed,

acted without power or authority to force upon them his representation before the Highest Court. That action by the Solicitor General was a clear violation of the constitutional, civil and human rights of the Indians to be represented by counsel of their own choosing.

A reply today to the request to the Solicitor General that the Supreme Court would forthwith be advised of their rejection of that official's representation of them in the matter will be greatly appreciated.

A ruling by the Court in the present posture of the Joint Motion and the Response can, as stated, be disastrous to the Indians. It is understood that the Court reconvenes on 28 November 1977, hence the urgency in regard to this matter.

Sincerely,

/s/ Charles E. Trimble
CHARLES E. TRIMBLE
Executive Director
National Congress of American Indians

[SEAL]

OFFICE OF THE SOLICITOR GENERAL
Washington, D.C. 20530

Ms. Veronica L. Murdock
President
National Congress of American Indians
Washington, D.C. 20005

Dear Ms. Murdock:

Your mailgram of November 21, 1977, indicates concern that the United States' response to the Joint Motion for a Determination of Present Perfected Rights and the Entry of a Supplemental Decree in the case entitled *Arizona v. California*, No. 8 Original, fails to adequately assert the rights of the Indian Tribes of the Lower Colorado River to the waters of the Colorado River. Accordingly, you urge that this Office advise the Supreme Court of the Tribes' refusal to be bound by this response.

The position expressed in the response filed by the United States was based upon the recommendations of the Department of the Interior, which were in turn based upon that Department's extensive consultations with representatives of the tribes having an interest in this matter. Both the Department of the Interior and the Department of Justice are of the view that the position expressed in the government's response fully serves the best interests of all affected Indian tribes, and is thus wholly consistent with the government's fiduciary responsibilities.

This Office does not oppose the Confederation's efforts to express a contrary view to the Court. By letter of November 10, 1977, I advised Mr. Llewellyn Barrackman, the Chairman of the Confederation, of my consent to the filing of an *amicus curiae* response by the Confederation (and those of the individual tribes that might

wish to join the Confederation in such a filing). I also informed Mr. Barrackman that I had informally advised the Clerk of the Supreme Court that such a filing was contemplated. However, the United States, and all tribes for whom the United States holds rights in trust, will necessarily be bound by any decree entered by the Supreme Court that applies to the United States as a party. It would therefore be both inaccurate and inappropriate for me to purport to advise the Supreme Court to the contrary.

Finally, in your mailgram, you seek the funding of "independent legal" representation in this case for the tribes. The expenditure of funds by the Department of the Interior for "independent legal" representation for Indian tribes in litigation is a matter within that Department's purview. As such, we have forwarded your correspondence to the Solicitor of that Department for such consideration as they deem appropriate.

I trust this is responsive to the concerns expressed in your mailgram. It is a pleasure to be of service.

Sincerely,

WADE H. MCCREE, JR.
Solicitor General

cc: Mr. Llewellyn Barrackman
Chairman, Confederated Tribes of
the Lower Colorado River
Needles, California 92363

Mr. Norwin McCabe
Chairman, Fort Mojave Tribe
Needles, California 92363

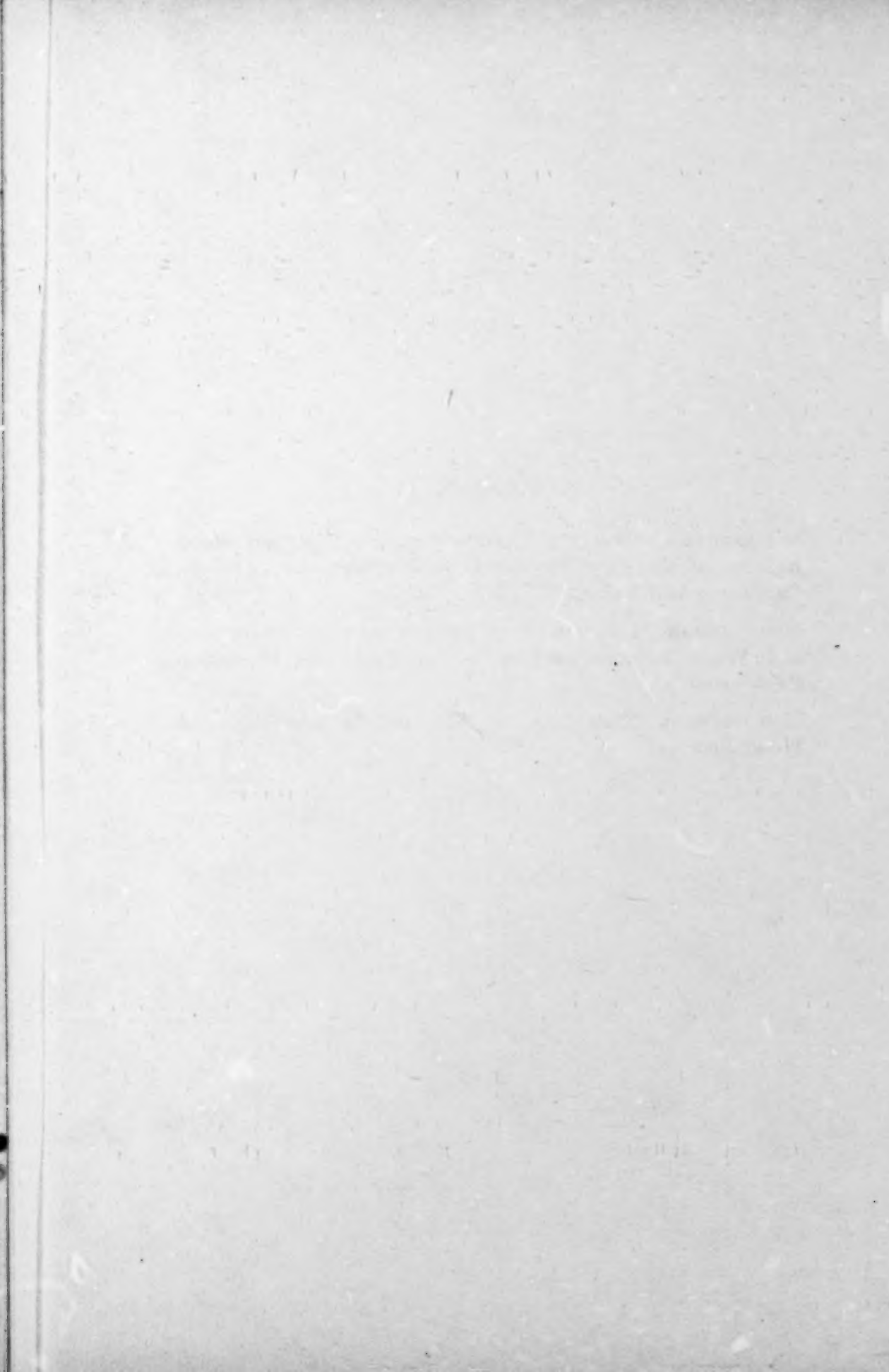
Mr. Frank Cabe, Jr.
Chairman, Colorado River Indian
Tribes
Parker, Arizona 85344

APPENDIX B

Memorandum, "Western Boundary of the Hay and Wood Reserve of the Fort Mojave Indian Reservation, Arizona, California and Nevada"

Memorandum, "Location of the western boundary of the Hay and Wood Reserve portion of the Fort Mojave Indian Reservation"

Memorandum, "Boundary of the Fort Mojave Hay and Wood Reserve"



[SEAL]

UNITED STATES DEPARTMENT of the INTERIOR

Office of the Secretary
Washington, D.C. 20240

June 3, 1974

Memorandum

To: Director, Bureau of Land Management
Through: Assistant Secretary, Land and
Water Resources

From: Secretary of the Interior

Subject: Western Boundary of the Hay and Wood Reserve of the Fort Mojave Indian Reservation, Arizona, California and Nevada

I have this date received a memorandum from the Solicitor regarding the proper location of the western boundary of the Hay and Wood Reserve of the Fort Mojave Indian Reservation. A copy of his memorandum is attached.

Acting upon the conclusions expressed in the Solicitor's memorandum, I have determined that the 1928 resurvey conducted by Sidney Blout under direction of the General Land Office, and the plat representing that resurvey of the above-mentioned western boundary of the Hay and Wood Reserve, approved November 15, 1930, and accepted on January 23, 1931, should be declared null and void and to have no further force or effect.

The western boundary of the "Camp Mojave Reservation for Hay and Wood" is most accurately determined and established in accordance with the intent of the original survey by using the courses, distances and acreage as described in the plats and notes of survey accompanying the Executive Order of March 30, 1870. I reject as erroneous those portions of that description which make

reference to posts "marked U.S. in a mound of earth near the left bank of the Colorado River" used in connection with Corner III and Corner IV appearing on the plat and in the notes of survey accompanying the above mentioned Executive Order of March 30, 1870.

Please take all such actions as may be appropriate to implement the conclusions herein stated, including declaring null and void the above-mentioned 1928 resurvey and the plat respecting that resurvey of the western boundary of the Hay and Wood Reserve accepted January 23, 1931, and resurveying the Reserve to conform to the acreage description of 9114.81 acres. Correct Corner III and Corner IV should be reestablished in accordance with the courses and distances described in the plats and notes of the survey accompanying Executive Order of March 30, 1870, to replace the erroneous and rejected Corner III and Corner IV established by the 1928 resurvey.

It is also requested that a determination be made as to what third-party interests may have been established and that appropriate action be taken to subrogate such interests to the Fort Mojave Tribe in those instances in which it is determined that such third-party interests affect the lands inside the now recognized western boundary of the reservation.

Please note the official records accordingly so that henceforth such records will indicate the proper location of the western boundary of the Hay and Wood Reserve of the Fort Mojave Indian Reservation in the subject area.

/s/ Rogers C. B. Morton

[SEAL]

UNITED STATES DEPARTMENT of the INTERIOR

Office of the Solicitor
Washington, D.C. 20240

June 3, 1974

IN REPLY REFER TO:

Memorandum

To: Secretary of the Interior

From: Solicitor

Subject: Location of the western boundary of the Hay and Wood Reserve portion of the Fort Mojave Indian Reservation.

On March 8, 1974, I met with a delegation from the Fort Mojave Tribe who brought to my attention a long standing dispute over the exact location of the western boundary of that portion of their reservation which had originally been the hay and wood reserve for the military post at Camp Mojave. The details of the dispute are set out fully in the attached memorandum to me from the Associate Solicitor for Indian Affairs.

Attorneys in the other divisions of my office have reviewed this dispute and the memorandum from the Associate Solicitor. I have also personally reviewed the matter and discussed it with all the attorneys involved. I am convinced that this Department as a matter of law should acknowledge and declare that the correct western boundary of the Hay and Wood Reserve portion of the Fort Mojave Reservation is most accurately reflected by the courses, distances and acreage descriptions contained in the plats and notes of survey which accompanied the Executive Order of March 30, 1870.

In order to finally resolve this dispute, it will be necessary to declare null and void a previous 1928 resurvey of

this boundary by Sidney Blout of the General Land Office. This 1928 resurvey was approved by the General Land Office in 1931. In 1957, the Secretary approved a tribal constitution which stated that the Hay and Wood Reserve contained 9114.81 acres, which in turn conforms to the courses and distances and acreage description in the 1870 Executive Order.

It is likely that the Director, Bureau of Land Management, may also have to take some other actions to remove any cloud on the right of the Fort Mojave Tribe to use and occupy the area included within the area described by the courses and distances referred to above. In the event you concur, a memorandum to the Director, Bureau of Land Management which would accomplish these results is attached for your signature.

/s/ [Illegible]
Solicitor

UNITED STATES DEPARTMENT of the INTERIOR

Office of the Solicitor
Washington, D.C. 20240

[SEAL]

April 12, 1974

IN REPLY REFER TO:

Memorandum

To: Solicitor
From: Associate Solicitor, Indian Affairs
Subject: Boundary of the Fort Mojave Hay and
Wood Reserve

I. Facts and Background

A. Statement of the Conflict

The Camp Mojave Military Reservation and the Reserve for Hay and Wood were established "for military purposes" by an Executive Order of President Grant, dated March 30, 1870. The two reserves are located on bottomlands of the Colorado River where the boundaries of the states of Nevada, California and Arizona come together. By an Executive Order dated September 19, 1890, both reserves were transferred to the Department of the Interior to be held in trust as a reservation for the Fort Mojave Indian Tribe. The boundary description of the two reserves as contained in the 1870 Executive Order and the 1890 Executive Order, is as follows:

Camp Mojave—Commencing at a post marked "U.S." in mound of earth situated N. 83° 31' 37" E., 66.99 chains distant from the flagstaff at the post; thence variation 14° 08' 28" east, south 33° 08' 28" W., 240 chains to a post marked "U.S." in mound of sand; thence north 56° 51' 32" W. 232.60 chains to a post marked "U.S." in mound of coarse gravel; thence

north $33^{\circ} 08' 28''$ E. 240.00 chains to a post marked "U.S." in a mound of coarse gravel, near the west bank of Beaver Lake; thence south $56^{\circ} 51' 32''$ E. 232.60 chains to the point of commencement. The said boundaries containing 5,582 acres, 1 rood, 24 perches, a little more or less.

Camp Mojave Hay and Wood Reservation—Commencing at a post marked "U.S." in mound of earth situated south $10^{\circ} 43' 41''$ E. 347.52 chains distant from the flagstaff at Camp Mojave and about 20 chains southwest from the point where the road crosses the top of the mesa; thence variation $14^{\circ} 08' 28''$ east, south $1^{\circ} 04' 28''$ W., 272.50 chains to a post marked "U.S." in a mound of earth near the quartermaster's corral; thence south $76^{\circ} 17' 28''$ W. 228.50 chains to a post marked "U.S.") in a mound of earth near the left bank of the Colorado River; thence north $23^{\circ} 01' 32''$ W. 362.70 chains to a post marked "U.S." in a mound of earth near the left bank of the Colorado River; thence south $88^{\circ} 45' 32''$ E. 369.00 chains to the post at the point of commencement. The said boundaries containing 9,114.81 acres, more or less.¹

The present controversy concerns the western boundary of the Hay and Wood Reserve. The language of the War Department Order, relied upon in the Executive Order,

¹ The 1870 Executive Order included within the military reserve:

"The intermediate tract lying between the Hay and the Post Reservation, bounded on the West by the Colorado River and on the East by a line running from Station I of the Hay and Wood Reserve to Station I of the Post Reserve."

Inadvertently, this intermediate tract was not expressly transferred by the 1890 order. It was, however, specifically included within the Ft. Mojave Indian Reservation in 1903. *Executive Orders Relating to Indian Reservations: From May 14, 1855, to July 1, 1912*, p. 12 (1912).

This "intermediate tract" clearly belongs to the tribe.

describes the boundaries of each reserve in terms of courses and distances and by reference to the amount of acreage enclosed. Reference in each description is also made to posts placed at each corner. In the case of the Hay and Wood Reserve, the reference to the posts marking the western border locates them as being "near the left bank [or east bank] of the Colorado River." But the existence of this reference creates an inconsistency in the description; if the courses and distances and acreage specified in the order are followed, the western boundary of the Reserve must necessarily be located *west* of the flood plain of the Colorado River.

The Fort Mojave Tribe and the Bureau of Indian Affairs construe the order as locating the reservation boundary west of the Colorado River.² The Bureau of Land Management interprets it as creating the river as the

² Memorandum, March 14, 1973, BIA Area Director Phoenix to Commissioner, Indian Affairs; Memorandum, August 28, 1973, Assistant to the Secretary for Indian Affairs to the Solicitor.

The efforts of the Mojave Tribe to have their equitable title to this land recognized have been of long standing. Beginning in 1910, the State of California petitioned the General Land Office to obtain title to some of the bottomlands located on the western bank of the Colorado River and within the Hay and Wood Reserve as claimed by the tribe and BIA. The state claimed these were public lands, and subject to claim by it pursuant to the Swamp and Overflowed Lands Act of 1850 and 1866. 43 U.S.C. § 987. While the state's petition was rejected in 1910, because GLO acknowledged the western boundary of the reservation was unsettled, the State reasserted its claim after the 1928 Blout survey. This led ultimately to an administrative adjudication in which the Tribe intervened. 8 IBLA 164 (1972).

The results of this determination are inconclusive for present purposes. The Board held against the State on the ground that the lands were not "swamp and overflowed," lands under the act, but did not pass on the tribe's claim to equitable title. The BIA, however, resurveyed the land and its expert witness, Rupkey, testified in the tribe's behalf at the hearing. His testimony is referred to in the footnotes herein as "Rupkey Testimony."

reservation's western boundary.¹ At issue between the Indians and BLM is the equitable ownership to approximately 3500 acres of land. This issue has not been definitely resolved between the respective Bureaus, and conflicting interpretations and actions have persisted over the years. Accordingly, I recommend that this matter be submitted to the Secretary for final determination.

I have carefully reviewed the factual background of this long-standing controversy and have considered the pertinent legal principles. I recommend that the Secretary issue an order recognizing the equitable title of the Fort Mojave Tribe to the full 9,114.81 acres specified in the 1870 order. The reasons for my recommendation follow.

B. Historical Background

1. Wheeler Survey

Prior to issuance of the 1870 executive order, the area which became the Hay and Wood Reserve was surveyed by Lieutenant George Wheeler of the U.S. Army.^{2a} Lt. Wheeler spent two days surveying the Hay and Wood Reserve in January 1869, and he took notes of his survey.^{2b} During the same general period, and in rapid succession, Wheeler also surveyed over a dozen other military reservations in the area.

¹ The latest memorandum espousing this position is from Clark L. Gumm to Members of the Fort Mojave Task Force, dated May 18, 1971.

^{2a} The lands within the Mojave Valley, including the lands presently in dispute, were part of the lands aboriginally possessed by the Mojave Tribe, and were held by the tribe in "Indian title." 7 Int. Col. Comm. 219, 253.

^{2b} Lt. George M. Wheeler, Survey Notes, 1868-1869, Books Nos. 2, 10, National Archives, Record Group 77, Records of the Office of the Chief of Engineers.

Thirteen months after his survey was completed,⁴ Lt. Wheeler and an assistant—Mauran—drew a map depicting the Hay and Wood Reserve. The map was drawn in San Francisco using Wheeler's notes. The 1870 map depicts the boundaries of the Hay and Wood Reserve, and it shows the Colorado River as running along the western boundary of the reserve. Its dimensions, however, and its relationship to Fort Mojave are scaled to conform to the courses and distances and the acreage specified in General Order Number 19. The map therefore depicts a physical impossibility, since a reserve of the dimensions portrayed and traced out at the indicated latitude and longitude could never have been established east of the Colorado River.

Little is known of the circumstances surrounding the actual drawing of the 1870 Wheeler map. The map was drawn by J. R. Mauran, one of Wheeler's assistants, and it is signed by Lt. Wheeler. Any records describing the creation of the map were probably lost in the San Francisco earthquake. However, it seems likely that the map would have been drawn by reference to Wheeler's notes and to whatever maps the Army Headquarters had at its disposal in San Francisco at that time. All of the maps available to the Army command in San Francisco in 1870 contained erroneous locations of the Colorado River.⁵ Hence, the most likely explanation of the

⁴ During these thirteen months, Wheeler was occupied on a grueling exploratory mission in southern Nevada unrelated to his surveys in 1868 and early 1869. William H. Goetzmann, *Exploration and Empire* (Alfred A. Knopf 1966), p. 399, 468.

⁵ The maps of the Lower Colorado River available in 1870 to the creators of the Wheeler Map were all slightly erroneous. Three maps known to have been available to the Army in San Francisco at that time have been recovered from the National Archives. The first is the result of an 1855 survey of the Second Standard Parallel North in California by Henry Washington. This line runs east and west terminating in the vicinity of Corner IV of the Hay and Wood Reserve. It is known that Mr. Washington used a defective sur-

1870 Wheeler map is that Wheeler's survey notes were traced onto a map that erroneously located the Colorado River west of its true longitude.

2. The 1870 Order

The boundary descriptions of the two Fort Mojave reserves appeared first in a communication from the Headquarters of the Military Division of the Pacific in San Francisco to the Adjutant General of the U.S. Army in Washington, D. C.⁶ The letter is dated March 12, 1870, and describes eight separate reserves that were surveyed

veyor's chain so that all his measured distances were reported too short. Rupkey Testimony *supra*, Tr. p. 1394. Hence, in reporting the location of the Colorado River, Washington locates it two and one-half miles west of where it actually was in 1855. This would place the river where it never could have been in the foothills west of the alluvial plain. An extensive field survey of the Lower Colorado was undertaken by Lt. J. C. Ives in 1858. Goetzmann, *Army Exploration in the American West, 1803-1863* (Yale 1959), p. 380-393. The National Archives contains two maps that were prepared as a result of this survey. The first map, known as the Ives-Churchill map, was not published as part of the Ives report. It does, however, locate the Colorado River approximately one and a half miles west of its true location. Rupkey Testimony, *supra*, Tr. p. 1394. See also Memorandum from Clark L. Gumm to members of the Fort Mojave Task Force, May 18, 1971 (hereafter "BLM Memorandum") p. 5; *State of California*, 8 IBLA 164, 192-203 (1972).

The second map, dubbed the Ives map of 1861, is the one that accompanies Ives' final report. It depicts the natural contours in greater detail than the first map, and it contains a correction for latitude and longitude. Despite the relocation of the Lower Colorado further eastward, however, the second map still contains errors with respect to the river's proper location. Memorandum from Clark L. Gumm, Chief, Division of Cadastral Survey to Regional Solicitor, Los Angeles, California, July 22, 1971; See also U.S. Geological Survey, *The Deposits of the Colorado River on the Fort Mojave Indian Reservation in California 1850-1969* (1970) n. 3, n. 10. Hence, the Hay and Wood Reserve plotted on either of these maps lies to the east of the Colorado River.

⁶ Letter from Headquarters Military Division of the Pacific to Adjutant General, U.S. Army, Washington, D.C. March 12, 1870, National Archives, Record Group 49.

by Wheeler during his assignment in 1868 and 1869. It recommends that all eight be formally sanctioned as military reserves. President Grant's March 30, 1870, Executive Order adopted the descriptions of the reserves therein without change. Since the letter was written after the 1870 map was drawn, the most reasonable conclusion is that the reference to the left bank of the Colorado River crept into the description at this point. The letter is signed by Major General George Thomas, not by Lt. Wheeler; it is probable that he or his aide inserted the reference to the river in the boundary description after studying the faulty 1870 Wheeler Map.

3. The 1890 Transfer of the Reserve to the Department of the Interior

When the two reserves were transferred to the Department of the Interior in 1890, no new survey was ordered. The Executive Order of September 19, 1890, merely approves the recommendation of the Acting Secretary of War⁷ which recommended that "the Military Reservation of Fort Mojave, Arizona, be transferred and turned over to the Department of the Interior for Indian school purposes". Hence, the cartographic error created in February 1870, received formalization as an executive order in September 1890. The latent ambiguity contained in the Executive Orders went undiscovered until 1903.⁸

4. Subsequent Administrative Actions

Since 1903, however, the inconsistencies in the reservation's boundary description have been recognized by agen-

⁷ The letter is from the Acting Secretary of War, L. A. Grant, to the President, dated September 18, 1890. This type of executive order vests the same type of equitable title in the Indians as a more formal definite executive order. Department of the Interior, *Federal Indian Law* (1958) p. 620.

⁸ Letter from Acting Director, Geological Survey to the Secretary of the Interior July 9, 1903, National Archives, Record Group No. 48.

cies of this Department.⁹ In that year, the Geological Survey requested a clarification of the boundary question prior to completing official maps of the area.¹⁰ The BIA responded that the boundary was the Wheeler Line in the western foothills, regardless of the true position of the Colorado River in 1869 or in more recent times.¹¹ The General Land Office apparently took a contrary position, as it ordered a resurvey of the reservation in 1905. The special instructions issued by the Surveyor General to John Fisher, the surveyor, told him to survey the east, and south boundaries of the Hay and Wood Reserve and to treat the Colorado River as the western boundary of the entire reservation, including Camp Mojave, the Hay and Wood Reserve and the intermediate tract.¹² [No official plat was prepared adopting this survey. The 1905 survey is significant, however, in that it confirmed the location of the flagstaff used by Wheeler.]

⁹ I attach relatively little weight to correspondence and documents that do not show any awareness of the potential for conflicting interpretations. For example, the first Reservation Superintendent, after the land was transferred to this Department, stated in a letter to the Commissioner of Indian Affairs dated December 8, 1891, that "the Hay and Wood Reservation is located . . . entirely on the East Bank of the Colorado River The Colorado River . . . is the western boundary of the Hay and Wood Reservation." However, the same letter states that the total acreage of the Hay and Wood Reservation is "9,114.81."

¹⁰ William H. Goetzmann, *Army Exploration in the American West, 1803-1863*. (Yale 1959) pp. 380-393.

¹¹ Letter from Commissioner of Indian Affairs to the Secretary of the Interior, July 16, 1903, National Archives, Record Group No. 48. This BIA position may not have been consistently held throughout all the intervening 70 years. For example, the Commissioner of Indian Affairs concurred in a February 27, 1929, letter from the Acting Assistant Commissioner of the General Land Office to the Secretary of the Interior, which letter stated (based on a 1928 GLO survey to be discussed *infra*) that the western boundary as established by the courses and distances in the 1870 Wheeler Map was erroneous.

¹² See Memorandum from Area Director to Commissioner of Indian Affairs, March 14, 1973, *supra* Note 1 attachment Exhibit C.

The General Land Office conducted another survey in 1928. The instructions to Surveyor Sidney Blout prejudged the issue in dispute: Blout was directed to determine where the Colorado River flowed in 1869 and establish the western boundary of the Reserve in a line along the eastern bank of the old river course.¹³ Blout resurveyed the Hay and Wood Reserve accordingly, and the resultant official plat was adopted by the General Land Office in January 1931.

Several aspects of the Blout survey deserve mention. The new plat reduces the size of the original Wheeler plat by 3,500 acres, which is in excess of 33 percent of the originally specified 9,114.81 acres. Secondly, the courses and distances for the Blout plat do not correspond to those of the Wheeler plat. Thirdly, the truncated Hay and Wood Reserve does not stand in the same relation to the Fort Mojave Military Reserve as did Wheeler's Hay and Wood Reserve. Hence, the Blout survey created a reserve that is substantially different from that described in the Order of 1870.

In 1941, the GLO ordered another survey of the lands that were removed from the Hay and Wood Reserve by the Blout Line.¹⁴ These lands were accordingly surveyed and subdivided by Vander Meer and thereafter, as part

¹³ *Id.*, Attachment Exhibit D. The instructions, dated January 7, 1928, referred to "a small topographic map accompanying" them and stated:

It will be observed that corners III and IV fall on ground so high as to preclude any possibility of the river having flowed to the west thereof in 1869. This condition can only be explained by assuming serious errors in the lengths of the north and south boundaries of the reservation for hay and wood. You will, therefore, run said boundaries on their record courses but only so far to the west as will place the west boundary in a position that conditions on the ground indicate as its probable position in 1869.

¹⁴ *State of California*, 8 IBLA 164, 183 (1972).

of the public domain, awaited disposal under the various public land laws.

Other agencies have accepted the BIA position. The U.S. Geological Survey has subsequent to the 1928 survey treated the western boundary of the Reserve as extending beyond the Colorado River; the 1950 Needles Quadrant of California and Arizona map clearly identifies the full 9,114.81 acres as an Indian reservation.^{14a} More recently, the United States took the position before the Supreme Court in *Arizona v. California* (No. 9 Original, October Term 1959) that "the specification in the Executive Order of a total area of 9114.81 acres delineated by boundaries defined by courses and distances is controlling."¹⁵ This case was commenced to allocate the waters of the lower Colorado River between the states of that region. The United States as a party claimed water rights for federal lands in those states, including the Ft. Mojave Indian Reservation. This required the Special Master to hear evidence as to the size of the Hay and Wood Reserve. While the Special Master held against the contention of the United States on this point and concluded that the 1928 General Land Office survey correctly determined the western boundary of the Hay and Wood Reserve,¹⁶ the

^{14a} A later map covering a much larger area and entitled "Western United States, 1:250,000, Needles," does show the western boundary is being in accordance with Blout's survey. This later map serves only to prove the inconsistency with which one branch of the Department has dealt with the issue. Geological Survey has two current maps which cover the Fort Mojave Indian Reservation, the 1950 Needles Quadrant and the above referenced map. Yet, the maps place the boundary in different places.

¹⁵ Memorandum of the United States Re Fort Mohave Indian Reservation Boundary, p. 1.

¹⁶ Special Master's Report, pp. 282-83, the Special Master premised his conclusion on the conclusiveness of the GLO survey and its immunity to judicial review. However, any lack of judicial power to review the survey is irrelevant for the present purposes, because the Secretary of the Interior unquestionably has the power

Supreme Court rejected his holding on the grounds that it was unnecessary for resolution of the case. *Arizona v. California*, 373 U.S. 546, 601 (1963). Instead, the Court used the lesser acreage of the Blout Survey for determining the tribe's water allocation, subject to enlargement if the boundary dispute were subsequently resolved in the tribe's favor. 376 U.S. 340, 345 (1964).

The Secretary has not approved the plats created as a result of the Blout survey. In May, 1957, however, the Secretary did approve the Constitution and Bylaws of the Ft. Mojave Tribe, which provide as follows (Article II): ". . . The authority of the Fort Mojave Tribe shall extend to the following land areas: . . . the so-called Hay and Wood Reserve . . . containing approximately 9,114 acres, more or less . . ." I place substantial weight on this action by the Secretary (as did the United States in its brief in *Arizona v. California*,¹⁷). His approval of the tribal constitution and bylaws is neither a ministerial nor an incidental action—it is required by statute,¹⁸ indicates his non-acceptance of the 1928 survey and a contrary administrative interpretation of the 1870 Executive Order, and in my view supercedes the 1931 GLO approval of the Blout survey because that survey is incompatible with the tribe's constitution and bylaws.

II. Legal Analysis

The legal question to be resolved concerns interpretation of the intent of the 1870 and 1890 executive orders. That

to set aside erroneous surveys by the GLO. *Knight v. United States Land Association*, 142 U.S. 161 (1891).

The Special Master also concluded that the 1928 survey correctively determined the boundary with respect to monuments as against courses and distances and area. Special Master's Report pp. 285-287. For the reasons discussed *infra*, I have concluded that the Special Master was in error.

¹⁷ Memorandum of the United States Re Fort Mohave Indian Reservation Boundary, p. 10.

¹⁸ 25 U.S.C. § 476.

intent, it clearly appears, was to create a reserve as surveyed by Lt. Wheeler. I conclude from a detailed analysis of Wheeler's notes and techniques, as follows, that Wheeler surveyed a reserve of 9114 acres, and that the 1870 order intended to establish a reserve of that size. Accordingly, the courses and distances plus the acreage description better describes the intent of the order than does the call to monuments.

A. The Intent of the 1870 Order

Clearly, the drafters of the 1870 order intended to create a reserve as surveyed by Lt. Wheeler. The most likely conclusion—based upon Wheeler's notes, his surveying techniques and the terrain of the area—is that Wheeler did survey a 9,114.81 acre reserve that spanned the Colorado River.

This conclusion is further substantiated by independent evidence of the understanding in the local community at the time as to where the boundaries of the reserve were. There is correspondence from 1872 referring to timber taken from that portion of the reserve lying west of the Colorado River.^{18a}

Wheeler's notes, taken on the scene at the time when the survey was made, describe the terrain and his techniques, and preserve his crucial notations. At least some of these notes have been recovered from the National Archives and have been thoroughly studied and analyzed. Wheeler's survey technique was to establish corner posts for the reserve and then to determine a course and distance description for the reserve. His determinations were made by taking sitings to the corners from two different points outside the reserve through an instru-

^{18a} Letter from Captain Pond, Camp Mojave to Headquarters, March 24, 1872, National Archives, Record Group 393, Ft. Mojave, Arizona, Letters sent.

ment from which angular readings could be obtained. Using the angles so read, distances and acreage could be accurately determined by trigonometry.¹⁹

In his notes for the Hay and Wood Reserve, Wheeler describes the establishment of Corner I and the two surveying stations for taking sites to the corners.²⁰ The actual readings for the sitings from one of these stations to Corners II, III, and IV are recorded. The readings from the other station are not included.²¹ There is no description of the location of the Colorado River in relation to the corners, nor is there a description of the land in the vicinity of Corners III and IV.

In the vicinity of the Hay and Wood Reserve, the Colorado River flows through an alluvial plain approximately five miles wide.²² The plain, or bottomlands, are rich in vegetation. On either side of the plain, the terrain ascends several hundred feet to a sandy, barren plateau. Moving away from the river, the plateau ultimately gives way to rocky foothills and mountains. In contrast to the bottomlands, vegetation on the plateaus and foothills is sparse or non-existent.

Lt. Wheeler established stations from which to survey the Hay and Wood Reserve on the barren plateau to the east of the alluvial plain.²³ Looking west from these points, he sited his instrument at three different corners and

¹⁹ Rupkey Testimony, *supra* n.1, Tr. pp. 1391-1395.

²⁰ Survey Notes, *supra*, n.3.

²¹ Not all of the notebooks used on the Wheeler expedition were available from the National Archives. It is believed that one of these, kept by either Wheeler or one of his colleagues, records the missing readings from Station No. 2.

²² State of California, 8 IBLA 164, 181-182; See also U.S. Geological Survey, the Deposits of the Colorado River on the Fort Mojave Indian Reservation in California, 1850-1969 (1970) p. 8.

²³ Survey Notes, *supra*, n.3.

recorded the angles to each. Two corners, Numbers III and IV, were marked by fires. The third, Corner II, was marked by a flag.

To establish Corners III and IV as advocated by the BIA, Wheeler's men—but not necessarily Wheeler or Mauran—would have had to cross the Colorado River. The river is not, however, visible from the siting stations on the eastern plateau but is concealed by the dense foliage that carpets the bottomlands. It is probable that Wheeler himself never approached the river in the vicinity of the Hay and Wood Reserve, and that he therefore had no personal recollection of its location.

Corners III and IV were not chosen arbitrarily. While there is no proof as to what caused the selection of these spots, the two points are logical locations for surveyors using Wheeler's techniques. Both points are high enough above the flood plain to make possible their use as siting points. Corner III is 120 feet above the flood plain; Corner IV is 320 feet above the flood plain. Here it must be pointed out that, when siting to fires, it is necessary that the base of the fire be visible in order to obtain an accurate reading.²⁴ If, instead, fires had been lighted on the east bank of the river, they would have been hidden from the sight of one standing on the eastern plateau. In addition to being of proper height, both corners can be aligned with an identifying feature of the terrain. A line from Corner III through Corner II is in alignment with Boundary Cone, a prominent peak to the east long used as a natural landmark. Corner IV is due west of the Corner I, and, similarly, a line from Corner IV through Corner I is also in alignment with Boundary Cone. A line between Corners III and IV, while enclosing some uplands, is set far enough west so as to include a bulge in the bottomlands. It is no

²⁴ See Memorandum from Area Director, *supra*, Note 1, Attachment p. 16.

further west than necessary to include all of the bottomlands located between the north and south boundaries of the Reserve.²⁵

The sequence of events in the surveying of the Hay and Wood Reserve most probably went as follows.²⁶ Wheeler and his party went south of the fort along an established road on the plateau to the east of the river. At a point where the road began to descend the plateau into the river's bottomlands, Wheeler established his first siting station. From there and a second nearby station, he took sitings to the flagstaff at the fort in order to establish his position. He then measured off a distance of 24 chains down the plateau and into the bottomlands to establish Corner I. He then returned to the plateau and established a third siting station. Next he sent some of his men across the river to set up fires at what would become Corners III and IV. His men were to locate Corners III and IV by reference to Corners I and II and to natural terrain features. Wheeler then took readings to Corners II, III and IV from stations 2 and 3. Subsequently, he compared readings taken at Station 2 (of which there is no record) to readings taken at Station 3 and, using trigonometry, computed the courses and distances contained in the boundary description.

The available evidence supports this conclusion. The plateau and the road in the vicinity of Corner I have been located and they conform to the sketches in Wheeler's notes. The original flagstaff at Fort Mojave was relocated by the 1905 Fisher survey. Using the readings in Wheeler's notes, his siting stations on the plateau can be reestablished by reference to the flagstaff.

²⁵ The facts of the terrain features are taken from Geological Survey maps for the Needles Quadrant, Calif. Arizona (1950) and the Needles Quadrant, Arizona; and from exhibits introduced by the BIA for the hearings in *State of California*, 8 IBLA 164 (1972).

²⁶ Rupkey Testimony, *supra*, no. 1.

Sittings from these stations to Corners II, III, and IV conform to the readings in Wheeler's notes.

A BJA survey team using modern instruments has re-surveyed the reserve following Wheeler's notes.²⁷ The resultant plat is identical to the plat on the Wheeler map, and angular readings and terrain features correspond to those in Wheeler's notes. The acreage within this plat is 9114 acres.

B. The Call to Courses and Distances Plus Area Should, in these Circumstance, Prevail Over The Call to Monuments

While it is true that a call to monuments in a boundary description should generally prevail over courses and distances, the latter must prevail over monuments in cases where the courses and distances better indicate the intent of the grantor.²⁸ As the Supreme Court has stated:

It is true that, as a general rule, monuments, natural or artificial, referred to in a deed control, on its construction, rather than courses and distances;

²⁷ This resurvey was accomplished as part of the preparation of the case of Ft. Mojave Tribe in *State of California*, IBLA 70-150, the decision of which is reported in 8 IBLA 164 (1972).

²⁸ All authorities on the subject support these propositions. Tiffany says: "In the case of a description by boundaries, as in other cases, the intention of the grantor, as inferred from the terms of the description, is the controlling consideration, and any rules which the courts may have formulated as to the relative importance of various elements of the description are merely intended as aids in arriving at this intention." 4 Tiffany, 3d ed., Sec. 993, pp. 94-95.

Thompson in his works on Real Property, emphasized the importance of the intention of the parties formulating the document containing the description, in these words: " * * * the general rules as to the greater or lesser degree of weight and control to be given to one form of description as compared with another are not absolute but are mere aids to be used in the construction of the deed to discover the real intent of the parties, such intent being the things which governs where there is latent ambiguity!" 6 Thompson on Real Property, 1962 Replacement, Sec. 3021, p. 442.

but this rule is *not inflexible*. It yields whenever, taking all the particulars of the deed together, it would be absurd to apply it. For instance, if the rejection of a call for a monument would reconcile other parts of the description, and leave enough to identify and render certain the land which the sheriff intended to convey, it would certainly be absurd to retain the false call, and thus defeat the conveyance. (Emphasis supplied.) *White v. Luning*, 93 U.S. 514, 524 (1876).

Continuing, the Court noted:

"It would therefore be manifestly wrong, not to say absurd, to retain the call for the fence, and reject the call for course and distance. The reason why monuments, as a general thing, in the determination of boundaries control courses and distances, is, that they are less liable to mistakes; but the rule ceases with the reason for it. If they are inconsistent with the calls for other monuments, and it is apparent from all the other particulars in the deed that they were inadvertently inserted, the reason for retaining them no longer exists, and they will be rejected as false and repugnant." (Emphasis supplied)

Other courts have held that preference for monuments cannot be applied where the existence of the monument cannot be established and proved. *Hanson v. Red Rock*, 4 S. Dak. 358, 57 N.W. 11 (1893). Further, where the monument referred to is a natural object and its position or shape has changed over time, the boundary described by courses and distances and acreage should prevail. *Smith v. Hutchison*, 104 Tenn. 394, 58 S.W. 226 (1900). See also *Luginbuhl v. Hammond*, 179 Cal. App. 2d 350, 3 Cal. Rptr. 582 (1960).

In this case, none of the posts referred to as monuments in the 1870 Executive Order *has ever been dis-*

covered and the Colorado River is a natural monument which has undergone radical changes over time.²⁹ The rules of comparative dignity of calls in a boundary description are rules of construction adaptable to the circumstances and the intention of the conveying instrument. *United States v. Redondo Development Company*, 254 Fed. 656 (8th Cir. 1918); *Ewart v. Squire*, 239 Fed. 34 (4th Cir. 1916). They are not to be applied so as to defeat the intent of the grantor. *White v. Luning*, 93 U.S. 514 (1876).

The intent of the 1870 Executive Order is clear upon reference to the specification within the Order of a total quantity of 9,114.81 acres. When there is doubt of its true description, designation of quantity may be properly

²⁹ It is well established that for a call to a natural object to be controlling, it must be a locative call and not merely a descriptive or directory call. Locative calls are defined as specific calls, descriptions, or marks of location, referring to landmarks, physical objects, or other points by which the land can be exactly located and identified. Descriptive or directory calls are those which merely direct the neighborhood wherein the different specific calls may be found. II *Corpus Juris Secundum*, Boundaries, Sec. 4. The reference to a marked post in a mound near the river in 1870 manifestly did no more than describe generally the neighborhood of the boundary corner.

The indefiniteness of "near" is well illustrated by the case of *Creech v. Johnson*, 116 Ky. 441, 76 S.W. 185 (1903) involving a call in a state patent to a stake "near Cumberland Gap." The Court there, in construing the patent, "reversed" the calls so as to give effect to the intent to grant a specified number of acres, even the result was to locate the corner in question five miles from Cumberland Gap, the Court holding that such location might reasonably be spoken of in the survey, as "near Cumberland Gap." See also *Mizell v. Simmons*, 79 N.C. 182 (1878), to the effect that courses and distances must prevail over a call "to or near" the head of a certain creek.

More specifically, the California Court of Appeals has ruled that the expression "near the river" is not the equivalent of a description reading "at the river bank" and refused to hold that that language fixed the river bank as a controlling monument. *San Pedro, L.A. & S.L. R. Co. v. Simmons Brick Co.*, 45 Cal. App. 57, 187 P. 62 (1919).

considered, *Chapman & Dewey v. St. Francis*, 232 U.S. 186, 197 (1914). *Field v. Columbia*, Fed. Case No. 4764, 4 Sawy. 523 (1864). And it may have controlling weight, particularly if there is uncertainty in the specific description. *Montana Mining Co. v. St. Louis Mining & Milling Co.*, 183 Fed. 51 (9th Cir. 1910).

The Supreme Court in *Ainsa v. United States*, sustained the all-controlling factor of intent saying:

So monuments control courses and distances, and courses and distances control quantity, but where there is uncertainty in specific description, the quantity named may be of decisive weight, and necessarily so if the intention to convey only so much and no more is plain. 161 U.S. 208, at 229 (1895).⁸⁰

Nor does the addition of the words "more or less" detract from the significance of the specification within the Executive Order of a quantity of 9,114.81 acres. Used in connection with quantity, these words are merely words of safety and precaution, intended to cover some slight or unimportant inaccuracy. 6 Thompson on Real Property, Sec. 3353. The Supreme Court has specifically rejected the words "a little more or less" when used in a grant which clearly expresses the quantity. *United States v. Fossat*, 61 U.S. (20 How.) 413, 427 (1957).

In interpreting the Executive Orders of 1870 and 1890, moreover, any ambiguities should be construed in favor of the Mojave Indians. It is well settled that in any treaty or agreement with an Indian tribe, ambiguous language is to be construed in favor of the Indians or as the Indians would have understood it. *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918); *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970).

⁸⁰ Accord: *Security Land & Exploration Co. v. Burns*, 193 U.S. 167, 179-180 (1904).

Nor is this rule of construction strictly limited to interpretations of treaties. The Supreme Court has stated in a case involving an executive agreement:

"But in the Government's dealings with the Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized, without exception, for more than a hundred years and has been applied in tax cases." *Choate v. Trapp*, 224 U.S. 665 at 675 (1912).

The same rule applies when construing statutes that apply to Indians. *Menominee Tribe v. United States*, 391 U.S. 404 (1968); *Squire v. Capoeman*, 351 U.S. 1 (1956); *United States v. Santa Fe Pac. R.*, 314 U.S. 339, (1941); *Bennett County v. United States*, 394 F.2d 8 (8th Cir. 1968); *Drummond v. United States*, 131 F.2d 568 (10th Cir. 1942).

/s/ Reid Peyton Chambers

/s/ John Wyeth Griggs

/s/ [Illegible]

Copy to:

Mr. Lindgren

Mr. Striegel

Commissioner Thompson

Mr. LaFollette Butler

Mr. Veeder

Mr. McHale

APPENDIX C

**Memorandum, "Title to Certain Lands Riparian to Lake
Havasu"**



[SEAL]

UNITED STATES DEPARTMENT of the INTERIOR
Office of the Secretary
Washington, D.C. 20240

Aug. 15, 1974

Order

To : Assistant Secretary for Fish and Wild-
life and Parks
Assistant Secretary—Land and Water Re-
sources
Commissioner of Indian Affairs

From : Acting Secretary of the Interior
John C. Whitaker

Subject : Title to Certain Lands Riparian to Lake
Havasu

I have today determined to correct the designation by Secretary Ickes of November 25, 1941 that certain lands of the Chemehuevi Indian Reservation should be taken for use in the construction of Parker Dam pursuant to the Act of June 8, 1940, 54 Stat. 744. The corrected designation determines, establishes and confirms that the Chemehuevi Tribe has full equitable title to all lands within the Chemehuevi Indian Reservation riparian to Lake Havasu designated by Secretary of the Interior Ickes on November 25, 1941, between north and south boundaries as follows:

North Boundary

From a point in Section 18 T5N R25E, located as follows: Beginning at the SE Corner of said Section 18 due west 711 ft; thence N00°21'E a distance of 1304 ft; thence N51°20'W a distance of 1967 ft; thence N01°16'E a distance of 1130 ft. From said point the North Boundary is established on a line S74°08'E to the minimum pool elevation of the west bank of Lake Havasu.

South Boundary

From a point on the south line of Sec. 33, T4N, R26E which is 3156' N89°51'E a distance of 350' more or less to the minimum pool elevation of the west bank of Lake Havasu.

This corrected designation is subject to the reservation of certain rights in the United States as follows:

(a) The right to deposit spoil and snags from Lake Havasu on said lands at locations mutually agreeable to the United States and the Tribe, provided that the Tribe's consent should not be unreasonably withheld;

(b) the right to flood and seep said lands in connection with its operations under the Act of December 21, 1928 (45 Stat. 1057), the Act of August 30, 1935 (49 Stat. 1028), and the said Act of June 28, 1946, (60 Stat. 338), as amended;

(c) the right of free ingress to, passage over and egress from said lands for the purpose of exercising the above rights and for all lawful purposes in connection with (i) protection, maintenance and administration of the Havasu National Wildlife Refuge, (ii) United States responsibilities relating to administration of the Chemehuevi Indian Reservation and (iii) United States responsibilities relating to Lake Havasu and the Colorado River.

Additionally, the corrected designation is subject to the valid existing rights of private persons. There are two concession contracts and approximately seventy special use permits covering some of the lands in question. These expire at various dates between the present time and 1984. I direct that they be extended, to the extent necessary, until the following dates:

(1) *Residential permits*

(a) *Residents who use the permitted lands as a full time residence for a substantial portion of*

each year. I am informed that at least ten permittees are substantially full-time residents.* The latest of these permits expires on July 31, 1979. I direct that each of these permits should be extended until August 15, 1980. In addition, I am advised that several other permittees claim that they are substantially permanent residents of the area. If any individual permittee wishes formally to claim such status, by a letter directed to me, within sixty days of this date, I direct the Office of Hearings and Appeals of this Department promptly to hold an informal hearing at Havasu Landing to determine the validity of all such claims. The tribe may participate in that hearing. I reserve the right to, and will, extend any such permit until August 15, 1980 if the permittee is determined by the Office of Hearings and Appeals to be a substantially full-time resident.

- (b) *Other residential permittees (including those who use the permitted lands for weekend and vacation homes).* All such individual residential permits are to be extended until August 15, 1977.

* These are as follows :

Lot No.	Permittee	Permit Number
3	L.G. & Rose M. Pasley	23503
9	J.D. & Miriam Squires	23502
12	Aaron J. & Iona R. Laur	19774
18	John W. Goodgame	HAV-58
19	Dorothy Holley	12094
28	Dick & Eunice Parton	19745
31	Joseph, Jr. & Rosemary Benjamin	14800
40	Leo Rossler	19742
52	Leonard M. Vogt	HAV-52
56	Edward F. Patterson	HAV-73

- (2) *Non-residential permittees.*** These permits shall be extended until August 15, 1976.
- (3) The concession contracts expire in 1979 and 1984. They will not be extended, but until their expiration the Tribe will not interfere with the rights of the contractors or the general public to have access to the lands under contract as such reasonable locations as the Secretary shall determine.

Any of these permittees may obtain further extensions at the option and with the consent of the Tribe. All permit extensions here directed shall be subject to revision of the annual use fee, to be the fair market value of the land without improvements, at the date the present permit expires. I direct that all necessary appraisals be made at that time, and that all use fees shall be apportioned between the tribe and the United States from and after this date.

This corrected designation shall also be subject to all rights of the Metropolitan Water District of Southern California under that District's contract with the United States, captioned "Cooperative Contract for Construction and Operation of Parker Dam," dated February 10, 1933 (Designated 11r-712, as supplemented and amended by contracts between the same parties dated September 29, 1936, April 7, 1939 and December 16, 1952).

Finally, the corrected designation provides that the tribe shall not construct any permanent improvements within 300 feet of the minimum pool level of Lake Havasu.

** These are:

<u>Lot No.</u>	<u>Permittee</u>	<u>Permit Number</u>
34	Rialto Fish & Game Club	14821
58 & 59	California Division of Fish & Game	14834
66	The Plunkers Club	19747
100	Needles Rod. Boat & Gun Club	12081

5c

I direct that all necessary steps shall be taken to implement this decision, including modification of the boundaries of Havasu National Wildlife Refuge as established by Executive Order of President Roosevelt on January 22, 1941.

No. 8 Original

Supreme Court, U. S.
FILED

DEC 23 1977

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

STATE OF ARIZONA,
v. *Complainant*

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT,
IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY
COUNTY WATER DISTRICT, METROPOLITAN WATER DIS-
TRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES,
CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND
COUNTY OF SAN DIEGO, CALIFORNIA,
Defendants

THE UNITED STATES OF AMERICA AND STATE OF NEVADA,
Interveners

STATE OF UTAH AND STATE OF NEW MEXICO,
Impleaded Interveners

**BRIEF OF THE FORT MOJAVE INDIAN TRIBE,
THE CHEMEHUEVI INDIAN TRIBE, AND THE
QUECHAN TRIBE OF THE FORT YUMA INDIAN
RESERVATION IN SUPPORT OF MOTION TO
INTERVENE; JOINED IN BY THE NATIONAL
CONGRESS OF AMERICAN INDIANS AS
AMICUS CURIAE**

RAYMOND S. SIMPSON, Attorney for
The Fort Mojave Tribe of Indians,
The Chemehuevi Indian Tribe, and
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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 8 Original

STATE OF ARIZONA,
Complainant

v.

STATE OF CALIFORNIA, ET AL.,
Defendants

UNITED STATES OF AMERICA,
Intervener

**BRIEF OF THE FORT MOJAVE INDIAN TRIBE,
THE CHEMEHUEVI INDIAN TRIBE, AND THE
QUECHAN TRIBE OF THE FORT YUMA INDIAN
RESERVATION IN SUPPORT OF MOTION TO
INTERVENE; JOINED IN BY THE NATIONAL
CONGRESS OF AMERICAN INDIANS AS
AMICUS CURIAE**

PRELIMINARY STATEMENT

A quarter of a century ago, great urgency to have resolved the "present perfected rights" to the use of water in the Lower Basin of the Colorado River gave rise to the filing by the United States of America of its motion to intervene in the case initiated by the State of Arizona against the other movants who are named in the Joint

Motion.¹ Part of the urgency for the intervention of the United States was that it was an indispensable party to any litigation quieting the title of the movants to their "present perfected rights." On repeated occasions and for a variety of reasons, the State of Arizona has been unsuccessful in having determined its claimed rights in the Lower Basin of the Colorado River.² Acknowledging the pressing need to resolve the interstate conflicts of the State of Arizona and the other movants here, the Supreme Court granted the motion of the United States³ and on that same date, granted leave for Arizona to file its petition.⁴ Issues were joined in that historic case, a Special Master was appointed and a hearing was initiated, all pursuant to the direction of this Court. On December 5, 1960, the Special Master filed his report.

This Court, predicated upon the Special Master's Report and the applicable Congressional acts, rendered its opinion on June 3, 1963.⁵ Among other things, this Court's opinion was generally favorable to the Tribes. It recognized that the Tribes held "present perfected rights" in the Lower Colorado River and entered a decree determining, adjudging and declaring those rights. Very important here is that this Court additionally decreed that:

" . . . the only feasible and fair way by which [the Indian] reserved rights for the reservations can be measured is irrigable acreage." ⁶

¹ Motion dated December 31, 1952, filed by the United States to intervene in the case of *Arizona v. California*. At the time the motion was filed, there was pending the motion of the State of Arizona for leave to file its petition initiating the case of *Arizona v. California*.

² See *Arizona v. California*, 283 U.S. 423 (1931); 292 U.S. 341 (1934); 298 U.S. 558 (1936).

³ *Arizona v. California*, 344 U.S. 919 (1952).

⁴ *Id.*

⁵ *Arizona v. California, et al.*, 373 U.S. 546 (1966).

⁶ 373 U.S. 546, 601 (1963).

There was thus established the criterion for determining the measure of the Tribes' "present perfected rights." Hence, without first establishing the number of irrigable acres and the water requirements for those lands—which has never been done—it is impossible finally to determine the extent of the "present perfected rights of the Tribes.

On March 9, 1964, this Court established the "present perfected rights" for the Tribes, recognizing nevertheless that there would be a need for resolution among the parties of their "present perfected rights."⁷ It was likewise provided in that Final Decree, among other things, the method pursuant to which "present perfected rights" to the use of water would be determined.⁸ At that time, over eleven years ago, it was agreed that the matter of the "present perfected rights" would be settled by stipulation. The Indians, however, did not participate in any of the negotiations leading up to the "Proposed Stipulation" upon which the Joint Motion is predicated relative to the "present perfected rights" of movants.

At the time that the United States filed its motion to intervene, a quarter of a century ago, it was established beyond question that there was insufficient water in the Lower Colorado River to supply all of the claims of the conflicting and contesting parties in the litigation as formulated by the State of Arizona. It was, of course, that conflict among the parties on an interstate stream that created the justiciable issues which were entertained by the Court when it granted the petition of the State of Arizona to initiate the cause and the motion of the United States to intervene. Simply stated, it is the position of the Tribes in the Lower Colorado River that the Colorado River has been and is now quite similar to a

⁷ *Arizona v. California*, 373 U.S. 340 (1964), Final Decree, II(D) (1)-(5).

⁸ *Arizona v. California*, 376 U.S. 340 (1964), as amended on February 28, 1966, 383 U.S. 268 (1966).

"bankrupt estate." The conflicting claims over the short supply of water have resulted in a long and contentious struggle among those claimants who have been declared as holding title to "present perfected rights." Nevertheless, the great urgency of a quarter of a century ago, giving rise to the initiation of the cause, has been greatly mitigated insofar as the movants are concerned due to their reluctance fully to acknowledge the measure of the "present perfected rights" of the Tribes. As will be observed in the Joint Motion, the movants deny that the Tribes are entitled to substantial "present perfected rights" in connection with the lands which were involved in boundary disputes at the time of the taking of evidence in *Arizona v. California*.⁹

It is the firm belief of the Tribes that the overwhelming urgency of a quarter of a century ago was greatly dimmed by the recognition that the Tribes had substantial "present perfected rights." As a consequence of this Court's Decree, there has been great hesitancy on the part of the movants finally to determine the "present perfected rights" absent some method of diminishing the claims of the Tribes. It is the view of the Tribes, moreover, that the Joint Motion and the Response that was filed to it represent not only the conflicts of interest within the Interior and Justice Departments, but likewise reflect the grave concern of the joint movants that their "present perfected rights" will be diminished if the "present perfected rights" are judicially recognized and exercised by the Tribes.

Part of the explanation for the aggressiveness displayed in the Joint Motion against the Tribes is the fact that the Central Arizona Federal Reclamation Project is now abuilding. The joint movants are fully aware that the supply of water in the Colorado River is presently vastly

⁹ Joint Motion, Memorandum in Support, pp. 22-24.

overappropriated and that there is insufficient water for the project last mentioned. Those facts, which cannot be successfully disputed, have resulted in bitter contest for every acre-foot of water in the Colorado River resulting in the present dispute, all as set forth by the Tribes in this motion.

Conflicts of interest within the Departments of Interior and Justice pervade all aspects of the case of *Arizona v. California*. That circumstance has prevailed since the inception of the case. At all times, the Tribes have had forced upon them counsel who invariably represented interests which were diametrically opposed to the vested "present perfected rights" of the Tribes. It is, of course, recognized that *Arizona v. California* is a political case. That the Nation, the Tribes, the states and their political subdivisions are all striving to participate in the availability of water in the Lower Basin of the Colorado River is evidenced by the Joint Motion and the inadequate Response filed to it. It may be correctly stated that those "present perfected rights" to the use of water are perhaps one of the most valuable property rights on the face of the earth. Hence, it is not surprising that the struggle to own, control and exercise those rights to the use of water is fraught with contentiousness.

A prime example of the conflicts of interest involved in regard to the "present perfected rights" to the Tribes is well demonstrated by the initial act in connection with the initiation of the case of *Arizona v. California*. In the complaint filed in intervention by the United States, this language, among other, was used: ¹⁰

¹⁰ *Arizona v. California*, "Petition of Intervention on Behalf of the United States of America" filed November 2, 1953, para. 27, p. 23. See Joint Committee Print, 91st Congress, 1st Session, "Toward Economic Development for Native American Communities," A Compendium of Papers submitted to the Subcommittee on Economy in Government of the Joint Economic Committee, Congress of the United States, Volume 2, p. 513.

"... the United States of America was the trustee for the Indians and Indian Tribes and asserted 'that the rights to the use of water claimed on behalf of the Indians and Indian Tribes as set forth in this Petition are prior and superior to the rights to the use of water claimed by the parties to this cause in the Colorado River and its tributaries in the Lower Basin of that stream.'"

Where action of the signatories of the Joint Motion—among others—was immediate and hostile, it was contended by the movants that the rights of Indian Tribes were not "prior and superior" to those asserted by the movants. Upshot of the assertions contrary to the claims of the Tribes had an immediate and political result upon the Interior and Justice Departments. It is, of course, a sad commentary that officials of those two departments failed properly to assert the rights but, rather, bowed to the pressures of the movants. The matter was chronicled in detail by the *New York Times*.¹¹ The original petition and intervention filed by the United States was withdrawn from the Office of the Clerk of the Supreme Court and substituted language was adopted. From the original petition, there was stricken reference to the prior and superior character of the Indian rights.¹² That debasing of the Indian claims by the Justice Department is representative of the history of its representation of the Tribes throughout the case of *Arizona v. California*. It is to be observed that the Joint Motion filed May 3, 1977,

¹¹ Hearings before the Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs, U.S. Senate, 92d Cong., 1st Sess., on S. 2035, "A Bill To Provide For The Creation Of The Indian Trust Counsel Authority, And For Other Purposes." November 22 & 23, 1971, pp. 98 *et seq.*

¹² Joint Committee Print, 91st Cong., 1st Sess., "Toward Economic Development For Native American Communities," A Compendium of Papers submitted to the Subcommittee on Economy in Government of the Joint Economic Committee, Congress of the United States, Volume 2, p. 513.

and the purported Response to it filed by the Department of Justice November 10, 1977, all as reviewed in the motion of which this memorandum is in support, reflect the lamentable inability of both the Interior and Justice Departments to represent the Tribes in light of the conflicting interests which both departments purport to represent in *Arizona v. California*. It is equally clear that the political nature of the case of *Arizona v. California* is a predominant element not only in the method pursuant to which the claims are asserted, but likewise in regard to the course of conduct in the presentation of the Tribes' rights.

The debasement of the rights of the Tribes in the Petition to Intervene, which was finally filed with the Court, presaged the conduct of the trial. An examination of the record before the Special Master discloses this anomaly from the standpoint of preservation and protection of the Indian rights as required of the trustee. An official of the Bureau of Indian Affairs swears that the attorneys for the Justice Department assigned to represent the Tribes before the Special Master abandoned the Tribes' interests and vigorously advocated the conflicting claims of the joint movants Yuma and Gila Federal Reclamation Projects.¹³ That same Bureau of In-

¹³ This sworn statement from an official of the Bureau of Indian Affairs, Department of Interior, assigned to the preparation of the case of *Arizona v. California*, is representative of the failure properly to advocate the interests of the Tribe in the trial before the Special Master.

"AFFIDAVIT IN REGARD TO PROPOSED STIPULATION OF PRESENT PERFECTED RIGHTS," signed by Charles P. Corke, Acting Director, Irrigation, Bureau of Indian Affairs.

"21. I personally witnessed the Attorneys of the Department of Justice assigned to represent the Fort Mojave, Chemehuevi, Colorado River, Fort Yuma, and Cocopah Tribes, totally abandon the interests of those Indian Tribes and vigorously to act against the Indian Tribes by advocating the claims of the Yuma Federal Reclamation Project and Gila Federal Reclamation Project." Page F-10.

dian Affairs official declared that the interests of the Tribes were likewise abandoned by the attorneys for the Department of Justice in regard to the claims of the joint movants Imperial Irrigation District and the Palo Verde Irrigation District.¹⁴ It is important here that reference be made to the fact that the conflicts of interest within the Interior and Justice Departments are not limited to the conduct of the case of *Arizona v. California*. At a hearing before the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee, the issue of conflicts of interest within the Interior and Justice Departments has been reviewed in detail.¹⁵ Secretaries of Interior have readily admitted the conflicts of interest and the impossibility of the Department of the Interior properly and fully to represent the Indian Tribes' interests when those conflicts of in-

¹⁴ *Ibid.*, paras. 22 and 23:

"22. I personally witnessed the Attorneys assigned by the Department of Justice to represent the Indian Tribes above named, abandon all pretense of advocating the claims of those Indian Tribes against the Imperial Irrigation District and the Palo Verde Irrigation District, or other California interests, and those Attorneys did not contest the claims of the Districts and neither attempted to challenge the claims of the Districts by cross-examination nor to attempt to refute the claims asserted by the Districts by offering rebuttal evidence.

"23. I was present and joined in protestation to the Attorneys from the Department of Justice respecting their failure to advocate the interests of the Indian Tribes against the Imperial Irrigation District and the Palo Verde Irrigation District and other adverse interests and the only response made by those Attorneys [of the Department of Justice] was that such matters were 'purely issues between the States.'" Page F-11.

¹⁵ "Federal Protection of Indian Resources," Hearings before the Subcomm. on Administrative Practice and Procedure of the Comm. on the Judiciary, U.S. Sen., 92d Cong., 1st Sess., on Administrative Practices and Procedures Relating to Protection of Indian Natural Resources. Part 1, Oct. 19 & 20, 1971, pp. 175 *et seq.*; 220 *et seq.*; 228 *et seq.*; 233 *et seq.*

terest prevail.¹⁶ On the subject of the conflicts of interest within the Interior and Justice Departments, it has been amply stated that

“... No self-respecting law firm would ever allow itself to represent two opposing clients in one dispute, yet the Federal government has frequently found itself in precisely that position.”¹⁷

A movant here—the Fort Mojave Indian Tribe—petitioned this Court for leave to file a suggestion of interest in the case of *United States v. County of Eagle*.¹⁸ In support of that motion, there was set forth in detail an analysis of the

“Conflicts of Interest Before the Supreme Court of the United States * * * A Preface to Disaster for the American Indians.”¹⁹

There the conflicts of interest, giving rise to the filing of the motion here presented, are reviewed in detail. Likewise set forth in that analysis of conflicts of interest before the Supreme Court are the elements forcing the Tribes to seek relief from the damages that necessarily ensue to them from the failure of the Department of Justice and the Department of Interior properly to represent their interests.

¹⁶ See testimony, Secretary of Interior Hickel, “Federal Protection of Indian Resources,” pp. 228 *et seq.*; Secretary Rogers C.B. Morton and Assistant Secretary Harrison B. Loesch, Indian Trust Counsel Hearing, p. 12.

¹⁷ “Federal Protection of Indian Resources,” * * * Part 1, pp. 220, 226, Fn. 15.

¹⁸ *United States v. District Court in and for the County of Eagle*, et al., 401 U.S. 520 (1971).

¹⁹ In the Supreme Court of the United States of America, October Term 1970, No. 87, *United States of America, Petitioner, v. District Court in and for Eagle County*.

THE TRIBES ARE HERE THE REAL PARTIES IN INTEREST, NOT THE SECRETARY OF INTERIOR

A. The Tribes' "Present Perfected Rights" Are Interests In Real Property

It is elemental that the "present perfected rights" to the use of water in the Colorado River, title to which resides in the Tribes, are invaluable interests in real property. They are part and parcel of the reservation lands of each of the Tribes.²⁰ An action of the character of *Arizona v. California*, adjudicating the rights of the Tribes, it is important to observe, is an action to quiet title in and to real property.²¹ Full equitable title to those "present perfected rights" in the Colorado River resides in the Tribes with the legal title to those rights being held in trust for the Tribes by the United States.²² The Tribes, movants here, are the Tribes on whose behalf the United States of America acted.²³

²⁰ Wiel, "Water Rights in the Western States," 3d ed., vol. 1, sec. 18, pp. 20, 21; sec. 283, pp. 298-300; sec. 285, p. 301; *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 75 (1913); *Ashwander v. TVA*, 297 U.S. 288, 330 (1936); *Fuller v. Swan River Placer Mining Co.*, 12 Colo. 12, 17; 19 Pac. 836 (1898); *Wright v. Best*, 19 Cal.2d 368; 121 P.2d 702 (1942); *Sowards v. Meagher*, 37 Utah 212; 108 Pac. 1112 (1910); See also *Lindsey v. McClure*, 136 F.2d 65, 70 (CA 10, 1943); *David v. Randall*, 44 Colo. 488; 99 Pac. 322 (1908).

²¹ *United States v. Ahtanum Irrigation District*, 236 F.2d 321, 339 (CA 9, 1956); *Crippen v. X Y Irr. Co.*, 32 Colo. 447, 76 Pac. 794 (1904); *Louden v. Handy Ditch Co.*, 22 Colo. 102, 43 Pac. 535 (1897); *Kinney on Irrigation and Water Rights*, p. 2844, sec. 1569.

²² See also *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 106-107 *et seq.* (1949); *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 278-281 (1953); *Northern Pacific R.R. Co. v. Wismer*, 230 Fed. 391, 393 (CA 9, 1916); 246 U.S. 283 (1918); *Gibson v. Anderson*, 131 Fed. 39, 40 (CA 9, 1904); *Antoine v. Washington*, 420 U.S. 194 (1975); see also 25 U.S.C. 476; 34 A.G. Op. 171, 181 (1924).

²³ *Arizona v. California*, 373 U.S. 546, 595 (1963) from which this excerpt is taken: "The government, on behalf of five Indian reser-

**B. The Tribes' "Present Perfected Rights"
Are Not "Federal Rights"**

The Tribes' "present perfected rights" are not "Federal rights." They are clearly distinguishable from the rights to the use of water, title to which resides in the United States for the benefit of the public at large. Moreover, the "present perfected rights" to the use of water, title to which is in the Tribes, are private in character being held by the Tribes for their exclusive use and benefit. Hence, their nature, extent, measure and purpose of use are drastically different from the other "present perfected rights" to the use of water referred to in *Arizona v. California*. Title to those public rights resides in the United States for the Lake Meade National Recreational Area, the Havasu National Wildlife Refuge, the Imperial National Wildlife Refuge and the Gila National Forest.²⁴ As this Court has recognized in *Arizona v. California*, the "present perfected rights" of the Tribes are "... essential to the life of the Indian people. . . ." ²⁵ This Court added that the "present perfected rights," held by the Tribes, are for "... their future uses. . . ." and are to be measured by "irrigable acreage." ²⁶ It was the objective of the United States of America in establishing the Indian reservations to provide for a permanent future home and abiding place for the Tribes in question.

Recently, comporting fully with the preceding statements that the Indian rights are not Federal rights, the Chairman of the Water Resources Council declared that

ventions in Arizona, California and Nevada, asserted rights to water in the mainstream of the Colorado River." *Winters v. United States*, 207 U.S. 546, 576 (1908).

²⁴ *Arizona v. California*, 373 U.S. 546, 601 (1963).

²⁵ *Arizona v. California*, 373 U.S. 546, 599 (1963).

²⁶ *Ibid.*, 373 U.S. 546, 601 (1963).

"Indian water rights are not the same as 'Federal rights' and, therefore cannot be included in a policy statement involving 'Federal rights'" ²⁷

That policy declaration is not only reflective of the law, it is a clear commitment by the Secretary of the Interior as the principal agent of the trustee United States that the Tribes' "present perfected rights" to the use of water are now and will be separately categorized from "Federal rights" in the administration of them.

C. The "Present Perfected Rights" Of The Tribes Have Not Been Taken

As reviewed in detail above, the full equitable title to the "present perfected rights" resides in the Tribes, the movants here. It is equally clear that the title to the Indian Tribes is drastically different from the title to the Federal rights and must be viewed as private rights as distinguished from the Federal rights which have been withdrawn for the benefit of the public at large. Being private rights in character, the "present perfected rights" of the Tribes are protected against seizure pursuant to the provisions of the Fifth Amendment of the Constitution. On the subject of the sanctity of the title of the Indian Tribes, reference is made to the case of *Shoshone Tribe v. United States*.²⁸ There, this Court reviewed the power and authority of the United States to:

"control and manage the property and affairs of Indians in good faith for their benefit and welfare * * * does not extend so far as to enable the government 'to give the tribal lands to others, or to appropriate them to its own purposes without rendering, or assuming an obligation to render, just compensation * * *; for that' would not be an exercise of

²⁷ *Federal Register*, Vol. 42, No. 145—Thursday, July 28, 1977, p. 38463.

²⁸ *Shoshone Tribe v. United States*, 299 U.S. 476, 497.

guardianship, but an act of confiscation.'" [Emphasis supplied]

Titles to the "present perfected rights" vested in the Tribes continue to reside in the Tribes unless and until "taken" by an act of Congress.²⁹ It is equally clear that, when the rights to the use of water of the Tribes were vested in them, they came within the purview of the Boulder Canyon Project Act, all as recognized by this Court,

"... that these water rights, having vested before the Act became effective on June 25, 1929, are 'present perfected rights' and as such are entitled to priority under the Act."³⁰

There is nothing in the Boulder Canyon Project Act, as amended,³¹ which would evidence an intention by the Congress to "take" the title of the Tribes in and to their "present perfected rights." It is elementary that the physical appropriation of private property by the Executive Branch of the Government without authority, does not result in a Fifth Amendment "taking." Congress alone has the power of eminent domain.³²

IRREPARABLE DAMAGE TO THE TRIBES IF THEY ARE NOT PERMITTED TO INTERVENE ON THEIR OWN BEHALF

There are agreements and proffered concessions contained in the Response of the Solicitor General to the

²⁹ *Mattz v. Arnett*, 412 U.S. 481, 504 (1973); *Seymour v. Superintendent*, 368 U.S. 351 (1962); *United States v. Celestine*, 215 U.S. 278 (1909).

³⁰ *Arizona v. California*, 373 U.S. 546, 600 (1963).

³¹ 43 U.S.C. 617 *et seq.*

³² *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Shoshone v. United States*, 299 U.S. 476 (1937); *United States v. North American Trans. and Trading Co.*, 253 U.S. 330 (1920).

Joint Motion which, if consummated by the approval of this Court, will cause irreparable and continuing damage to the Tribes. Under no circumstances can the Tribes agree to the greatly inflated claims to water, acreage and priorities that have been set forth by the Imperial Irrigation District, the Palo Verde Irrigation District and the Yuma and Gila Federal Reclamation Projects. Similarly, the Tribes reject any concession or agreement in regard to those vital elements of the "present perfected rights" claimed by the joint movants unless and until all of their "present perfected rights," including all boundary disputes and all lands that were abandoned, have been finally determined. Further piecemealing of the Decree in *Arizona v. California* can only contribute to grave and serious threats of irreparable damage to the Tribes.

If offered an opportunity, the Tribes can and will prove that known facts contradict and expose as false the claims to "present perfected rights" as asserted by the joint movants. Even with an effective subordination fully agreed to by joint movants and the Tribes, it is highly doubtful that the Tribes could accede to the known false claims of the joint movants. That statement is predicated upon facts—which are here asserted by the Tribes—that the "present perfected rights," claimed by the defendants, do not come within the language of the Decree entered by this Court.³³

THE RESPONSE VIOLATES THIS NATION'S TRUST

It is elemental that the officers of the United States of America are obligated to exercise care, skill and diligence in protecting, preserving, utilizing and conserving the invaluable "present perfected rights" to the use of

³³ *Arizona v. California*, 376 U.S. 340 (1964).

water of the Tribes in the Lower Colorado River.³⁴ Equally elemental is the precept of the law that "the trustee is under a duty to administer the trust solely in the interests of the beneficiaries." Failure of the Secretary of Interior to properly administer the trust for and on behalf of the Tribes is well known. Nevertheless, the Secretary is bound and required by the law to perform his responsibilities to the Tribes with "the most exacting fiduciary standards" even if he should desire to pursue a different course.³⁵ As reviewed above, the performances of the Solicitors Office of the Interior Department and the Justice Department are permeated with conflicts of interest precluding competent fulfillment of the obligations owing to the Tribes pursuant to their rights as beneficiaries of a trust. There have been catalogued, with care, the inherent violations of the Tribes' rights by the Solicitors Office.³⁶ Never has there been a better exemplification of violation of the trust owing to the Tribes than the Response filed by the Solicitor General to the Joint Motion in *Arizona v. California*. It matters not that those who prepared the Response did not know the facts that they were presenting to the Court. It is the law that they should have known those facts and have acted improperly not only as agents of this Court, but agents of the trustee United States of America for the benefit of the Tribes.

³⁴ "Federal Encroachment on Indian Water Rights and the Impairment of Reservation Development," in *Toward Economic Development for Native American Communities*, Joint Economic Comm., 91st Cong., 1st Sess., p. 484.

³⁵ *Ibid.*, p. 490.

³⁶ "Federal Protection of Indian Resources," Hearings before the Subcomm. on Administrative Practice and Procedure of the Comm. on the Judiciary, U.S. Sen., 92d Cong., 1st Sess., on Administrative Practices and Procedures Relating to Protection of Indian Natural Resources, Part 1, Oct. 19 & 20, 1971, pp. 233 *et seq.*

**PATENT AMBIGUITIES ³⁷ BETWEEN THE LANGUAGE
OF THE FINAL DECREE, THE JOINT MOTION AND
THE RESPONSE TO THE JOINT MOTION**

**A. Patent Ambiguities Appear On The Face Of The
"Proposed Supplemental Decree" ³⁸**

A patent ambiguity has been defined as arising from contradictory words of the instrument or instruments themselves.³⁹ As set forth in the Motion, of which this memorandum is in support, the Final Decree provides that

"In the event of a determination of insufficient mainstream water to satisfy present perfected rights pursuant to Article II(B) (3) of said Decree, the Secretary of the Interior shall, * * * first provide for the satisfaction in full of all rights of the * * * Tribes."
(Joint Motion, Pro. Supp. Decree, p. 4, [5])

It is then declared that those rights are specified in Article II(B) (3).⁴⁰ It will be observed from the Final Decree that there is no provision relating to "insufficient mainstream water to satisfy present perfected rights." Hence, there is contradictory language between the "Proposed Supplemental Decree" and the Final Decree, which supposedly is to be supplemented. Reference in that regard is made to the language of the Final Decree. There it is stated, among other things, that

*"If insufficient mainstream water is available for release, as determined by the Secretary of the Interior, to satisfy annual consumptive use of 7,500,000 acre-feet * * * after providing for satisfaction*

³⁷ Tribes' Motion to Intervene, pp. 5-6, para. 11.

³⁸ Joint Motion, Supplemental Decree," p. 3, para. 5.

³⁹ Black's Law Dictionary, Ambiguity, *Webster's Third New International Dictionary* defines a "patent ambiguity" as "an ambiguity in a legal document arising from the words themselves."

⁴⁰ *Arizona v. California*, 376 U.S. 340, Article II(B) (3).

*of present perfected rights in the order of their priority dates * * * [the Secretary of the Interior] may apportion the amount remaining available for consumptive use in such manner as is consistent with the Boulder Canyon Project Act as interpreted by the opinion of this Court herein * * *.* [Emphasis supplied]

It is elemental that there is a vast difference between insufficient water to supply 7,500,000 acre-feet of consumptive use and, to use the language of the "Proposed Supplemental Decree," "insufficient water to satisfy present perfected rights." The two are entirely different elements and must be separately considered. The preferred rights are "present perfected rights" and those are provided for as being satisfied antecedent to the apportionment of any water left over after those "present perfected rights" have been satisfied.

Evidencing the failure of the Solicitor General properly to perform his obligations in regard to the Tribes, this statement is contained in the Response:

"As stated by movants here, although the parties have now reached substantial accord on many points—including the subordination agreement incorporated in the movants' proposed supplemental decree * * *."

By approving the alleged subordination agreement, it is abundantly manifest that the Solicitor General is approving the conflict between the Final Decree and the proposed supplement to that Decree. There is, of course, the invitation for future conflict and future dispute by the failure of the Solicitor General properly to point out the patent ambiguity, to which reference is here made. Not only does the Solicitor General, in error, approve the obvious conflict between the Final Decree and the proposed supplement to it, the Solicitor General, in a proposed amend-

ment to the paragraph in question of the Joint Motion, says this among other things:

"(5) In the event of a determination of insufficient mainstream water to satisfy present perfected rights pursuant to Article II(B)(3) of said Decree, the Secretary of the Interior shall, before providing for the satisfaction of any of the other present perfected rights * * * first provide for the satisfaction in full of all rights of the * * *" Tribes.

It is very, very clear that the adoption of the patent contradiction between the Supplemental Decree and the Final Decree by the Solicitor General constitutes an endorsement of a contradiction that must necessarily create conflict in the future insofar as the Tribes are concerned.

It must be admitted by all that there is a disparity—a difference between—the language of the Supplemental Decree relating to insufficient water to satisfy "present perfected rights" and insufficient water to satisfy the 7,500,000 acre-feet of consumptive use awarded to the Lower Basin of the Colorado River by the Colorado River Compact.⁴¹

To request the Court to enter a Final Decree with provisions that require interpretation of it at the inception partakes of a frivolous approach—particularly when the Final Decree is contemplated to function in perpetuity.

More importantly, the matter is not an academic interpretation. Assuming—for argument—that in some manner a patent ambiguity should be adopted by the Court, it is essential to emphasize that the matter is of utmost importance when considered in the light of the decision of this Court. The Boulder Canyon Project Act, as construed in the Court's opinion, says, among other things, under

⁴¹ Colorado River Compact, Article III, Article III(a).

the heading "APPORTIONMENT AND CONTRACTS IN TIME OF SHORTAGE," that the Secretary of the Interior is empowered to act using very broad discretion. In that connection, the Court rejected the recommendation of the Special Master which authorized the Secretary of the Interior to prorate the water during periods of shortage predicated upon a formula set forth in the opinion.⁴² Having rejected the concept of proration on a fixed formula, the Court continued:

"None of this is to say that in the case of shortage, the Secretary cannot adopt a method of proration *or that he may not lay stress upon priority of use, local laws and customs, or any others factors that might be helpful in reaching an informed judgment in harmony with the Act, the best interests of the Basin States, and the welfare of the Nation.*"⁴³ [Emphasis supplied]

Under no circumstances can the Tribes agree that the Secretary of the Interior may exercise, in regard to their "present perfected rights," the broad powers vested in the Secretary of the Interior in regard to the "present perfected rights" of contractors. The "present perfected rights" of the Indian Tribes differ vastly from the contractual rights of the joint movants which have entered into arrangement pursuant to the Boulder Canyon Project Act, as amended. As reviewed above and emphasized, the "present perfected rights" of the Tribes were vested long prior to the Boulder Canyon Project Act which became law on June 25, 1929. That Act did not condemn and take from the Tribes their long-vested "present perfected rights," nor did any other act. Rather, those rights in real property, title to which resides in the Tribes, have never been subjected to eminent domain and, hence, the

⁴² Arizona v. California, 373 U.S. 546, 592 *et seq.* (1963).

⁴³ *Id.*, 373 U.S. 546, 594 (1963).

full equitable title of the Tribes remained in them.⁴⁴ It is not for the Executive Branch of the Government to exercise the power of eminent domain in regard to the "present perfected rights" of the Tribes. Congress alone has that power of eminent domain and, absent specific intent by the Congress, those vested rights of the Indian Tribes may not be taken.⁴⁵ Let it be here reiterated that the Tribes reject out of hand any contention that their "present perfected rights" are Federal rights reserved for the public at large.⁴⁶

B. Another Patent Ambiguity Between The Final Decree, The "Proposed Supplemental Decree" And The Response Further Demonstrates The Need For Rejecting Both The Joint Motion And The Response

For each of the Tribes, provision is made that they shall have "present perfected rights" as provided

"* * * in annual quantities not to exceed (i) * * * acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of * * * acres and for the satisfaction of related uses, whichever of (i) or (ii) is less * * *"⁴⁷

Thus there is established by the Final Decree the criteria for the determination of the water entitlement each Tribe may receive in the exercise of their "present perfected

⁴⁴ See above pp. 10 *et seq.*, particularly *Shoshone v. U.S.*, 299 U.S., 476, 497-498 (1937), fn. 28.

⁴⁵ See *Chippewa Indians v. United States*, 395 U.S. 479 (1939); *Mitchell v. Harmony*, 13 How. 115, 133-134 (1851); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Shoshone Tribe v. United States*, 299 U.S. 476 (1937); c.f. *United States v. North American Trans. & Trading Co.*, 253 U.S. 330 (1920).

⁴⁶ See above, p. 11, "B. The Tribes' 'Present Perfected Rights' Are Not Federal Rights."

⁴⁷ *Arizona v. California*, 376 U.S. 340, 344, Article II(D)(1)-(5).

rights." Contrary to the express language set forth in the Decree and quoted immediately above, the Joint Motion provides, relative to the water to the "present perfected rights" that will be exercised in regard to the boundary dispute lands, as follows:

"* * * such additional rights to diversions of main-stream water shall not exceed the quantities necessary to supply the consumptive use required for irrigation of the additional, practicably irrigable lands within the additional areas resulting from the enlarged boundaries." [Joint Motion, pp. 4-5, para. 4]

It is abundantly manifest that the Supplemental Decree and the proposed amendment to it, as contained in the Response, are sharply at variance as they pertain to the language of the Final Decree. It is respectfully submitted that human prescience falls far short of being able accurately to determine the consequences of knowingly entering a decree or a supplemental decree containing patent ambiguities of the character that are set forth above. It must be emphasized that the shortcomings of the Supplemental Decree were specifically emphasized to the Solicitor General and, in total disregard of the interests of the Tribes, that official rejected them. It is known that in years to come, the contradictory language and the variances of the language in the Decree and Supplemental Decree unquestionably will bring about controversial issues as to what the methods will be for determining entitlements of the Tribes under their "present perfected rights." Hence, it is respectfully submitted that the Tribes are entitled to have the ambiguities removed in advance of the entry of any final decree. It is likewise respectfully submitted to the Court that under no circumstances should a final decree be entered by the Court unless and until all the various disputes that are here involved are concluded. As emphasized above, it would be a clear breach of the obligation of this Nation as trustee for the

Indian Tribes to enter a decree knowing that in the future the contradictions in it would breed further controversy. Common sense dictates that to stipulate in regard to the rights of the joint movants without having a comparable stipulation in regard to the "present perfected rights" of the Tribes is to place the Tribes at a vast disadvantage in the light of the great political power of the joint movants, all as must be recognized by this Court. Reference is here made to the erroneous concepts to which the Solicitor General's Response has granted conditional approval.

C. The Response Would Accept Known Spurious Claims To "Present Perfected Rights" Asserted By The Joint Movants

It is an undeniable fact that the claimed rights of the Imperial⁴⁸ and Palo Verde Irrigation Districts⁴⁹ and the Yuma and Gila Federal Reclamation Projects⁵⁰ are spurious. Investigations, which were being conducted for the Tribes but were stopped by the Department of Interior, had advanced to the point where it became manifest that the claimed "present perfected rights" of the joint movants did not comport with the definitions contained in the Decree. Reference in that regard is made to the specific language of the Decree that describes perfected rights and "present perfected rights." It is declared:

"G. 'Perfected right' means a water right required in accordance with state law, which right has been exercised by (a) the actual diversion of a specific quantity of water (b) that has been applied to a defined area of land or a definite municipal or industrial works * * *." ⁵¹

⁴⁸ Joint Motion, p. 12, II. California.

⁴⁹ Joint Motion, p. 11, II. California.

⁵⁰ Joint Motion, pp. 6-7, I. Arizona; p. 11, II. California; p. 12.

⁵¹ Arizona v. California, 376 U.S. 340, 341, I., para. G.

In the definition which immediately follows, it is provided:

"H. 'Present perfected rights' means perfected rights, as here defined, existing as of June 25, 1929, the effective date of the Boulder Canyon Project Act."⁵²

As commented upon immediately above, the Tribes have conducted investigations sufficient to warrant a statement to this Court that the joint movants cannot prove the inflated claims that have been conditionally agreed to by the Solicitor General. Hence, it is an invitation to disaster for the Tribes to enter into any subordination when they know that the claims asserted by the joint movants are predicated upon the false and fabricated claims. The joint movants' claimed "present perfected rights" must fail as to the defined quantities of water and the defined acreage upon which water has been applied. Most assuredly, they cannot prove the vast quantities of water or the vast acreages together with priorities to which the Solicitor General has given his agreement. Under those circumstances, there is a clear violation of the obligation owing by this Nation to the Tribes by proceeding to stipulate to the "present perfected rights" of the joint movants, all as contemplated by the Response of the Solicitor General. It undoubtedly is a product of the conflicting interests within the Interior and Justice Departments that the Solicitor General would even contemplate acceptance of known false claims asserted by the joint movants.

D. Failure Of The Solicitor General Properly To Advise The Court Of The Status Of Boundary Disputes

As stated in the Motion, of which this memorandum is in support, the Response filed by the Solicitor General is deficient in all respects and gravely in error in other respects. It is inexplicable that the Court was not advised

⁵² Arizona v. California, 376 U.S. 340, 341, I., para. H.

of the Secretarial orders determining the status of disputes that were brought to the attention of the Special Master. That information is available and is part of the official records of the Secretary of the Interior.

It was gravely in error not to advise the Court that two boundary disputes, which were presented to the Special Master, have been resolved by Secretarial orders.⁵³

As reviewed below, it will be observed that the Court refused to dispose of the boundary disputes stating, however, that should a controversy arise over the titles because "of some future refusal by the Secretary to deliver water to either area, the dispute can be settled. . . ." Let this fact be respectfully submitted to the Court: Because the Tribes are not parties to the litigation, they are totally at the mercy of the Secretary of the Interior who purports to represent them. There is no stronger argument that the Indians must be separately represented than the fact that, if there is a dispute with the Secretary of the Interior, the Indian Tribes have no remedy because at this time they are not parties. They cannot be heard by the Court, absent a granting of this motion and the opportunity of the Tribes to be heard on their own behalf. It is abundantly manifest by reason of the conflicts of interest within the Interior and Justice Departments that the Tribes are and have been subjected to clear abuses of discretion on the part of the officials of both the Interior and Justice Departments in the case of *Arizona v.*

⁵³ *Arizona v. California*, Report dated December 5, 1960, p. 274, Boundary Dispute—Opinion, pp. 274 *et seq.*; Colorado River Indian Reservation; Boundary Dispute—Opinion, pp. 283 *et seq.*; Fort Mojave Indian Reservation, Hay and Wood Reserve. Relative to these boundary disputes, the Court said this: "We disagree with the Master's decision to determine the disputed boundaries of the Colorado River Indian Reservation and the Fort Mojave Indian Reservation. We hold that it is unnecessary to resolve those disputes here. Should a dispute over title arise because of some future refusal by the Secretary to deliver water to either area, the dispute can be settled at that time."

California. There is a pressing need to have the boundary disputes resolved by reason of the fact that on the Fort Mojave Reservation Hay and Wood Reserve, the lands have been cleared at great cost; an irrigation system has been constructed and placed in operation; those lands are now fully developed; and any question concerning their "present perfected rights" can constitute a most serious blow, financially and economically, to the Fort Mojave Indian Tribe. Similarly, in regard to the lands of the Colorado River Tribes (not parties to the motion), water is presently being used on them and there is a pressing need for a determination of the "present perfected rights" for those properties. Similarly, on both of the Cocopah (not a party to this motion), and the Chemehuevi Indian Reservations, the development and use of water are ongoing. Further delay can only have adverse consequences to those areas. Action by the Court, therefore, is a pressing necessity.

Additionally, reference is made to an extremely important phase of the law to which the Response to the Joint Motion does not refer. That principle of law relates to the plenary power of the Secretary of the Interior to issue orders relative to boundaries. In that connection, reference is made to the fact that in regard to the western boundary of the Fort Mojave Indian Reservation Hay and Wood Reserve, all of the lands there involved are public in character. Hence, the Secretary of the Interior has exclusive and plenary power to make that resolution which has been issued, all as reviewed above. The Court has declared as elemental the principle that the Secretary of the Interior, until title has passed from the United States to a private owner, may survey, resurvey and correct errors of the nature that were corrected by the Secretarial order of June 3, 1974, in connection with the Hay and Wood Reserve of the Fort

Mojave Indian Reservation.⁵⁴ Earlier, this statement was made by the Court on the subject of correcting errors in previous boundaries where the title resides in the United States:

"That the power to make and correct surveys of the public lands belongs to the political department of the government and that, whilst the lands are subject to the supervision of the General Land Office, the decisions of that bureau in all such cases, like that of other special tribunals upon matters within their exclusive jurisdiction, are unassailable by the courts, except by direct proceedings; and that the latter have no concurrent or original jurisdiction to make similar corrections, if not an elementary principle of our land law, is settled by such a mass of decisions of this court that its mere statement is sufficient."⁵⁵

Hence, it is not an issue that should properly be raised before this Court. Rather, it is a matter that has already been resolved by the Secretary of the Interior and the matter, as stated, should have been brought to this Court's attention by the Solicitor General and in the Response that was filed to the Joint Motion.

The same facts and concepts of law are, of course, applicable to the boundary disputes, to which reference has been made, relative to the Colorado River Indian Reservation (not a party to this motion).⁵⁶ In regard

⁵⁴ *United States v. State Investment Company*, 264 U.S. 206 (1924). See Motion, Appendix B.

⁵⁵ *Cragin v. Powell*, 128 U.S. 691, 698 (1888).

⁵⁶ MOTION FOR LEAVE TO INTERVENE AS INDISPENSABLE PARTIES BY THE FORT MOJAVE INDIAN TRIBE, THE CHEMEHUEVI INDIAN TRIBE, AND THE QUECHAN TRIBE OF THE FORT YUMA INDIAN RESERVATION; JOINED IN BY THE NATIONAL CONGRESS OF AMERICAN INDIANS AS AMICUS CURIAE, p. 11, "*B. Colorado River Indian Reservation—Colorado River Tribes Not A Party To This Motion 1. State of California Benson Line Area*

to the latter boundary line, litigation was brought as to certain lands which were school sections occupied by non-Indians. However, those boundaries are but a small portion of the area from the top of Riverside Mountain, throughout which the Benson Line extends.

It is equally clear that resolution of the Chemehuevi boundary by Secretarial order is also binding and probably is not subject to court review based on the precepts of *Cragin v. Powell*, to which reference has been made.

**RESOLUTION OF LONG-PENDING ISSUES ESSENTIAL
TO PROTECTION OF THE "PRESENT PERFECTED
RIGHTS" OF THE TRIBES AND TO BRING
STABILITY TO THE LOWER COLORADO RIVER**

A. The Quechan Title Issue

A most serious violation of obligations owing to the Tribes is the failure of the Solicitor General to bring to the Court's attention the fact that the title of the Quechan Tribe of Indians occupying the Fort Yuma Reservation is directly involved in any resolution of the "present perfected rights" in the Lower Colorado. In the motion (p. 14) reference is made to that substantial but unresolved issue. Yet, it is an issue well known to the Interior's Solicitor. On May 24, 1977, a resolution of the tribal problem was promised to the Quechan Tribe by the Solicitor.

The Quechan title dispute arose from the seizure for the benefit of the Bureau of Reclamation and the Imperial Irrigation District of the lands which constitute the Fort Yuma Reservation. The land seized and taken from the Tribe was used for the right-of-way for the All American Canal constructed as a principal unit of the Boulder Canyon Project. To accomplish the seizure, the Solicitor, by a 1936 Opinion, relied upon an 1893, forgotten, unenforced, fraudulantly obtained "alleged cession by the

Quechans of their reservation.”⁵⁷ The matter was fully investigated, the total invalidity of the “agreement” established, and the Solicitor prepared an opinion based on that investigation.⁵⁸ The proposed opinion was incredibly sent to the Imperial Irrigation District and others, inviting a political onslaught that came to pass.

Because of the political pressure, the final act of the out-going Solicitor under the last Administration was to reaffirm the 1936 “Margold” Opinion. It was promised, as stated, by the present Solicitor that the last Opinion would be reviewed. Hence, there is need for time to allow the Quechans to obtain the relief which they so desperately need. It is, therefore, manifest that when the Solicitor General makes a filing with the Response to the Joint Motion and ignores the Quechan issue, he is, at the same time, bolting the door forever against the Quechans of having honesty and integrity invoked on their behalf as is required of the trustee United States. From the Congressional hearing, it is abundantly clear that the issue of the Quechan title has not been resolved and unless the Court refuses to act upon the Joint Motion, the Quechans, as stated, will suffer irreparable and continuing damage.

⁵⁷ Sol. Op. M 28198, dated January 8, 1936: “Quechan Tribe of Fort Yuma Reservation, California,” Hearings before the Subcomm. on Indian Affairs of the Comm. on Interior and Insular Affairs, U.S. Sen., 94th Cong., 2d Sess., on Oversight on Quechan Land Issue, May 3 & June 24, 1976, p. 69, “SO-CALLED ‘MARGOLD OPINION.’” See Motion, p. 14, para. 24.

⁵⁸ *Ibid.*, pp. 89 *et seq.*; 55 *et seq.*; 135 *et seq.*

B. Failure Of The Justice Department To Offer Evidence To Special Master Relative To "Present Perfected Rights" Of The Tribes ⁵⁹

An official of the Bureau of Indian Affairs ⁶⁰ and others intimately and immediately involved in the preparation and presentation of the case of *Arizona v. California* prepared a memorandum which proved beyond a question that the conflicts of interest precluded the Tribes from having their day in court. That memorandum demonstrates that valid Indian claims were knowingly, arbitrarily and capriciously abandoned by the Department of Justice in the presentation of evidence to the Special Master in *Arizona v. California*.⁶¹ The memorandum, chronicled with care, with full documentation and affidavits in support, together with a request by the Commissioner of Indian Affairs to review the trust violations in the presentation of evidence in *Arizona v. California*, remains today without an official response from the Solicitor. Failure of the Solicitor General to refer to these facts in the Response to the Joint Motion partakes of the long-term pattern of violation of Indian rights to the use of water in the Lower Colorado River. Those violations have been under the direction of the various Secretaries of Interior who have very frequently acted in conjunction with the Attorney General of the United

⁵⁹ Joint Motion, p. 15, para. 27, "Indian Irrigable Acres And Title To 'Present Perfected Rights' For Which No Claim Has Been Made In *Arizona v. California*."

⁶⁰ See above, pp. 7 *et seq.*, fn. 13.

⁶¹ See Memorandum dated August 14, 1975, from the Commission of Indian Affairs to the Solicitor, Department of Interior, transmitting an August 13, 1975 "Memorandum Of Points And Authorities Supported By Affidavits Disclosing That Conflicts Of Interest In The Department Of Justice Resulted In The Fort Mojave, Colorado River, Fort Yuma, Chemehuevi, And Cocopah Indian Tribes I Being Denied Their Day In Court, And That II There Must Be Rejected The Proposed 'Stipulation Of Present Perfected Rights' In *Arizona v. California*."

States of America causing irreparable damage to the Tribes.⁶²

CONCLUSION

Representation by the Solicitor General has been forced upon the Tribes against their will. They have been effectively denied their day in court. Their right to be represented by counsel of their own choosing has been denied in clear violation of their constitutional, civil and human rights. Accordingly, the Tribes respectfully move the Court to allow them to be heard individually and collectively on their own behalf as intervening parties represented by counsel of their own choosing.

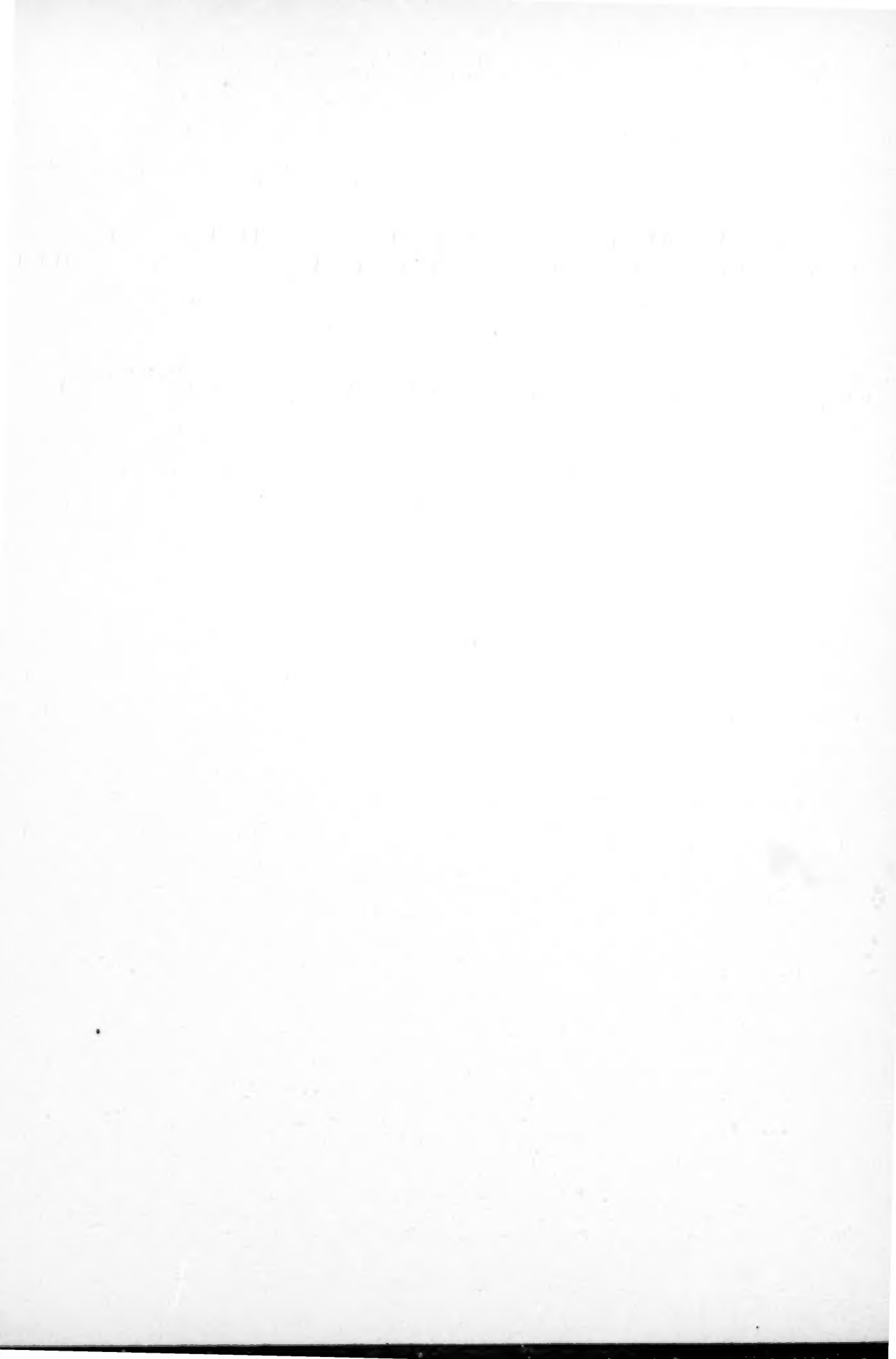
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⁶² "Federal Protection of Indian Resources," Hearings before the Subcomm. on Administrative Practice and Procedure of the Comm. on the Judiciary, U.S. Sen., 92d Cong., 1st Sess., on Administrative Practices and Procedures Relating to Protection of Indian Natural Resources, Part 1, October 19 & 20, 1971, p. 175 *et seq.*; 235 *et seq.*



IN THE
Supreme Court of the United States

Supreme Court, U. S.
FILED

JAN 30 1978

RODAK, JR., CLERK

October Term 1977

No. 8, Original of

October Term 1965

STATE OF ARIZONA,

Complainant,

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CITY OF SAN DIEGO, and COUNTY OF SAN DIEGO,

Defendants,

UNITED STATES OF AMERICA and STATE OF NEVADA,

Interveners,

STATE OF NEW MEXICO and STATE OF UTAH,

Impleaded Defendants.

Response of the States of Arizona, California, and Nevada and the Other California Defendants to the Motion for Leave to Intervene as Indispensable Parties, Filed by the Fort Mojave Indian Tribe, the Chemehuevi Indian Tribe, and the Quechan Tribe of the Fort Yuma Indian Reservation and Joined by the National Congress of American Indians as Amicus Curiae.

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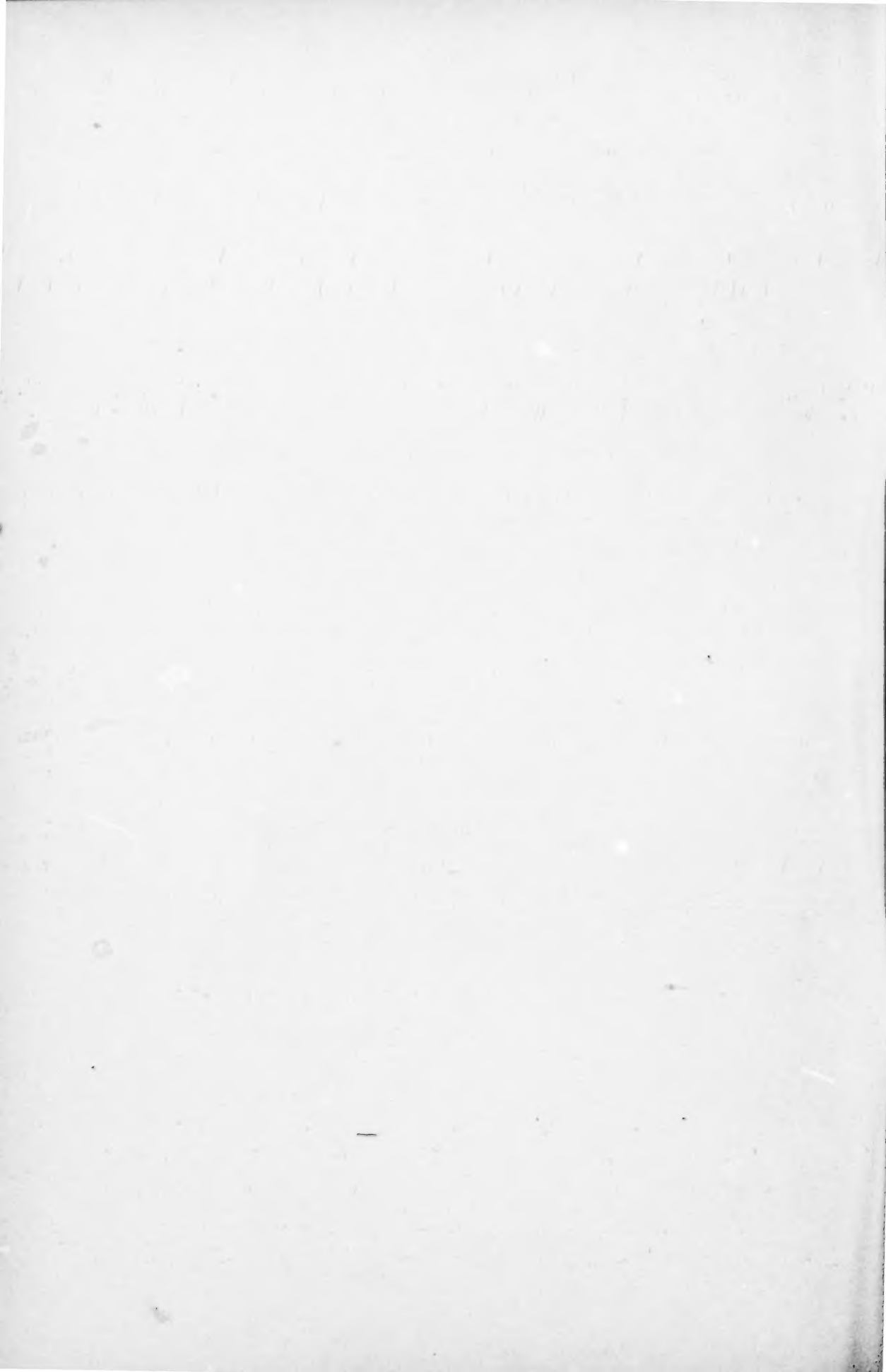
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IN THE
Supreme Court of the United States

October Term 1977
No. 8, Original of
October Term 1965

STATE OF ARIZONA,

Complainant,

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CITY OF SAN DIEGO, and COUNTY OF SAN DIEGO,

Defendants,

UNITED STATES OF AMERICA and STATE OF NEVADA,

Interveners,

STATE OF NEW MEXICO and STATE OF UTAH,

Impleaded Defendants.

Response of the States of Arizona, California, and Nevada and the Other California Defendants to the Motion for Leave to Intervene as Indispensable Parties, Filed by the Fort Mojave Indian Tribe, the Chemehuevi Indian Tribe, and the Quechan Tribe of the Fort Yuma Indian Reservation and Joined by the National Congress of American Indians as Amicus Curiae.

STATE OF ARIZONA, Complainant, the California Defendants (STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY

COUNTY WATER DISTRICT, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CITY OF SAN DIEGO, COUNTY OF SAN DIEGO) and STATE OF NEVADA, Intervener (hereinafter referred to collectively as the "State parties"), hereby oppose the Motion for Leave to Intervene as Indispensable Parties filed by the Fort Mojave Indian Tribe, the Chemehuevi Indian Tribe, and the Quechan Tribe of the Fort Yuma Indian Reservation (hereinafter referred to as the "applicant Indian Tribes" or "applicants") and joined in by the National Congress of American Indians as Amicus Curiae. The State parties contend that the Motion for Leave to Intervene should be denied and that proceedings toward carrying out this Court's mandate under Article VI of the 1964 Decree in this matter should be allowed to continue between the existing parties.

I

INTRODUCTION.

At the threshold, the applicant Indian Tribes should not be allowed to intervene because intervention would constitute a suit against the States of Arizona, California, and Nevada without their necessary consent. Furthermore, the applicant Indian Tribes do not qualify to intervene as a matter of right or for permissive intervention under the applicable rules. Intervention should be denied.

This matter is presently before the Court because the State parties filed, on May 2, 1977, a Joint Motion for a Determination of Present Perfected Rights and the Entry of a Supplemental Decree (hereinafter referred to as the "Joint Motion of May 2, 1977").

That Motion was made pursuant to Article VI of the Court's 1964 Decree in this lawsuit, and the current proceedings are limited to a determination of present perfected rights under Article VI.

Article VI is a vehicle for determination of non-Indian present perfected rights and only for a listing according to State of use of already-determined Indian present perfected rights. Indian rights were determined by this Court in its 1964 Decree, and any claims to additional Indian present perfected rights are to be determined not under Article VI, but under either Article II or Article IX. The current proceedings are thus not the proper place for applicants, or for the United States acting as their legal representative, to assert additional claims.

The existing parties, including the United States, are attempting to resolve matters under Article VI through a Supplemental Decree agreed upon by all the parties. The Joint Motion of May 2, 1977, together with the Response to it filed by the United States in November 1977, have given hope that such a resolution short of litigation is possible. The Proposed Supplemental Decree offered by the State parties in May 1977, together with modifications suggested by the United States in its Response, contain subordination language that will protect Indian present perfected rights against any possibility of prejudice by allegedly spurious non-Indian rights. The State parties deny that any of their claims are spurious, but contend that, in any case, the applicant Indian Tribes have no valid interest in challenging them.

The applicants are seeking to intervene at the end of a long negotiation process in which they have been

more than adequately represented. Their intervention would only prolong the proceedings under Article VI and would make inevitable litigation that could otherwise be avoided. The State parties believe that the only purpose of applicants' attempt to intervene is to assert rights not appropriately assertable in this proceeding under Article VI and to challenge non-Indian rights that would not prejudice them anyway.

Intervention should be denied and the existing parties should be allowed to continue attempts at meeting the Court's Article VI mandate.

II

THE MOTION FOR LEAVE TO INTERVENE SHOULD BE DENIED SINCE THE GRANT OF INTERVENTION WOULD AUTHORIZE A SUIT BY THE APPLICANT INDIAN TRIBES AGAINST THE STATES OF ARIZONA, CALIFORNIA, AND NEVADA WITHOUT THEIR CONSENT.

States of the Union are immune from suit in the federal courts without their consent except where that immunity has been surrendered by the adoption of the Constitution of the United States. There has been such a surrender of immunity by the states with respect to original actions in the Supreme Court only (1) by one state against another and (2) by the United States against a state. (*Principality of Monaco v. Mississippi* (1934) 292 U.S. 313; *Duhne v. New Jersey* (1920) 251 U.S. 311; *Smith v. Reeves* (1900) 178 U.S. 436; *Hans v. Louisiana* (1890) 134 U.S. 1.)

Since there has been no such surrender of immunity with respect to suits against a state by individual Indians or by Indian tribes, the sovereign immunity of the states extends to suits by Indians and Indian tribes.

(*United States v. Minnesota* (1926) 270 U.S. 181, 193; *Cherokee Nation v. Georgia* (1831) 30 U.S. (5 Pet.) 1; cf. *Skokomish Indian Tribe v. France* (9th Cir. 1959) 269 F.2d 555, 560-562.)

The Chemehuevi and Fort Yuma Indian Reservations are located in California. Such immunity exists as against the Chemehuevi and Quechan Indian Tribes whether they are regarded as citizens of California or not. If they are regarded as citizens of the State of California, this Court is without jurisdiction to entertain their suit against California because the judicial power of the federal courts does not extend to a suit brought against a state without its consent by its own citizens. (*Hans v. Louisiana* (1890) 134 U.S. 1.) They would also be barred from suit against the States of Arizona and Nevada by the Eleventh Amendment of the Constitution, which provides that "the Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state . . ." (*See Ford Motor Co. v. Treasury Department* (1945) 323 U.S. 459, 464.) On the other hand, if the Chemehuevi and Quechan Tribes are not regarded as being citizens of any state, then they may not prosecute a suit against Arizona, California, or Nevada because the "States of the Union, still possessing attributes of sovereignty, . . . [are] immune from suits, without their consent, save where there has been 'a surrender of this immunity in the plan of the'" Constitution. (*Principality of Monaco v. Mississippi* (1934) 292 U.S. 313, 322-323) (quoting from *The Federalist* No. 81 (Hamilton).) No such surrender has been made respecting suits in the federal courts by Indian Tribes.

The same rules bar suit by the Fort Mojave Indian Tribe even though the Fort Mojave Indian Reservation is located in Arizona, California, and Nevada. If it is deemed a citizen of no state, then it may not sue any of them under the *Principality of Monaco* rule. If it is deemed a citizen of all three states, it may not sue any of them under the *Hans* rule. If it is deemed a citizen of one or two states but not all three, it may not sue the states of which it is a citizen under *Hans* and may not sue the states of which it is not a citizen under the Eleventh Amendment and *Ford Motor* rule.

It is clear that intervention by the applicant Indian Tribes would constitute a suit against the States of Arizona, California, and Nevada. Whether or not a suit is one against a state is not to be determined by niceties of the law of parties but by the actual effect a judgment in favor of the applicants would have against the states. "[T]he nature of a suit as one against the state is to be determined by the essential nature and effect of the proceeding. *Ex Parte Ayers*, 123 U.S. 443, 490-99; *Ex Parte New York*, 256 U.S. 490, 500; *Worcester County Trust Co. v. Riley*, 302 U.S. 292, 296-98." (*Ford Motor Co. v. Treasury Department* (1945) 323 U.S. 459, 464.)

Apart from any claims of their own, applicants deny the validity of the major non-Indian present perfected rights claims. (Applicants' Motion, p. 17.) In so doing, they seek a judgment that would be contrary to the interests *parens patriae* of both Arizona and California on behalf of non-Indian present perfected rights claims in their respective states. Furthermore, as to their own claims to additional present perfected rights above

those quantified in the 1964 Decree, applicants seek a judgment that would be contrary to the interests of Nevada as well as Arizona and California. Some of the additional claims are for present perfected rights to the use of water in California. These claims would be contrary to the interests *parens patriae* of both Arizona and Nevada since in times of extreme shortage, there would be more, high priority claims for use of water in California. Similarly, additional claims for use of water in Arizona are contrary to the interests of California and Nevada, and additional claims for use of water in Nevada are contrary to the interests of Arizona and California.

It is clear that applicants seek a judgment that would be contrary to the respective interests of Arizona, California, and Nevada. The intervention sought would therefore constitute a suit against those states without their necessary consent, which they decline to give. Intervention should therefore be denied.

III

THE MOTION FOR LEAVE TO INTERVENE SHOULD BE DENIED FOR THE FURTHER REASON THAT THE APPLICANT INDIAN TRIBES DO NOT MEET THE REQUIREMENTS FOR INTERVENTION AS A MATTER OF RIGHT OR FOR PERMISSIVE INTERVENTION.

Even if consent of the States of Arizona, California, and Nevada were not a bar, the applicant Indian Tribes would have to meet certain requirements in order to intervene. The Supreme Court Rules do not address intervention, but Rule 9 applies to matters of original jurisdiction, such as this lawsuit. Section 2 of Rule 9 provides:

“The form of pleadings and motions in original actions shall be governed, so far as may be, by the Federal Rules of Civil Procedure, and in other respects those rules, where their application is appropriate, may be taken as a guide to procedure in original actions in this court.”

Rule 24 of the Federal Rules of Civil Procedure (FRCP) concerns intervention, and there would seem to be nothing in this action which would render inappropriate its application to applicants’ motion.

A. Applicants Do Not Have a Right to Intervene Under FRCP 24(a).

Section (a) of FRCP 24 deals with intervention as a matter of right and allows it, upon timely application, (1) in cases where a United States statute confers an unconditional right to intervene and (2) in other cases where certain requirements are met. Subsection (1) is not applicable to this case. Subsection (2) allows intervention

“When the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant’s interest is adequately represented by existing parties.”

Rule 24(a)(2) thus establishes four requirements, all of which must be met. The application for intervention must:

- (1) be timely;
- (2) show an interest in the subject matter of the action;

- (3) show that as a practical matter, protection of that interest may be impaired by disposition; and
- (4) show that the interest is not adequately represented by an existing party.

3 B. Moore's Federal Practice 24-284-24-285; *Nuesse v. Camp* (D.C. Cir. 1967), 385 F.2d 694. The State parties contend that the Indian Tribes' application does not meet all the requirements and, in fact, may not meet any of them.

1. The Indian Tribes' Application Is Not Timely.

This case was initiated by the State of Arizona in 1952. The United States was granted intervention in 1953 (344 U.S. 919). The matter was subsequently referred to and tried by a Master who reported his findings, conclusions, and recommendations to this Court in 1961. After hearing argument, this Court issued its Opinion in 1963 (373 U.S. 546) and Decree in 1964 (376 U.S. 340). Since then, the parties have been endeavoring to carry out the mandate of Article VI of that Decree, regarding present perfected rights.

The United States has represented the applicant Indian Tribes in all aspects of this matter since 1953 and at no previous time during that twenty-five year period have the applicant Indian Tribes applied to this Court to intervene. The States parties are aware that the mere passage of time alone does not necessarily determine timeliness, but raise the question of how any application for intervention, on whatever grounds, could be considered timely at this juncture.

When we look at the specific challenges made in the application, the lack of timeliness becomes even

more obvious. The applicants contend that the major non-Indian present perfected rights claims in Arizona and California are spurious and yet all these claims were made in lists filed by the respective states with this Court in March 1967. These claims and priority dates have been known to the applicants for nearly eleven years and yet have not been challenged. In fact, the total number of acre-feet in the challenged claims is less in the Proposed Supplemental Decree than it was in the original list. If any or all of these claims are spurious, therefore, the applicants have been on notice since 1967.

The applicants also contend that the United States has wrongfully failed to assert Indian present perfected rights claims for areas involved in boundary disputes and yet the United States also filed its list of present perfected rights claims in March 1967. That list, similar to the Proposed Supplemental Decree, did not assert claims for the disputed areas. Those disputes were known at that time, and applicants have thus been on notice of the United States position since 1967.

During the eleven years since the respective parties filed lists of present perfected rights claims, they have attempted to reach agreement on a supplemental decree containing these claims. Several years of this time were spent examining and challenging respective claims and priority dates until agreement was reached as to the validity, quantity, and priority dates of the claims. That process concluded in 1971 as to the major claims and in 1973 as to the miscellaneous claims. At no time during that period or until the filing of this motion have the applicants brought their challenges before this Court despite being on notice since 1967.

Finally, the applicants contend that the United States has wrongfully failed to assert Indian present perfected rights claims to acreage alleged to have been mistakenly excluded from calculations of irrigable acreage made in the Court's 1964 Decree. Aside from the *res judicata* question (to be discussed later), the applicants have been on notice since 1964 that the Decree excluded this acreage and were on notice long before that of the United States' decision not to assert claims for all this acreage at the trial before the Master. Applicants surely were on notice long before the August 13, 1975 Memorandum they refer to (Applicants' Brief p. 29), and even that memorandum was written two and one-half years ago, during which time the applicants made no application to this Court while the parties continued to work toward an agreement on present perfected rights.

2. The Indian Tribes Have No Remaining Interest in the Proceedings Under Article VI.

The State parties agree that the applicant Indian Tribes have an interest in the *Arizona v. California* lawsuit. These three Tribes already have present perfected rights under the 1964 Decree and are making additional claims. Nevertheless, the only matter presently before the Court is Article VI of that Decree, and that Article only contemplates the determination of non-Indian present perfected rights.

As the State parties have already argued in the Joint Motion of May 2, 1977 (at pp. 27-28), Article VI only requires the listing of Indian present perfected rights *already quantified* in Article II(D)(1)-(5) of the Decree. The purpose of this requirement is to divide these rights according to the state in which

they are to be exercised, but does not affect the total quantity of rights already decreed. Article VI certainly did not contemplate the claim of *additional* present perfected rights for the Indian Tribes when their rights had just been fully litigated and quantified in the Decree. This is particularly obvious in view of the short, two year period the Court allowed for submission of lists. Article VI did not have in mind the litigation of boundary disputes or the relitigation of irrigable acreage calculations so as to give rise to additional present perfected rights to be included in the United States' list.

Since determination of Indian Tribe rights is not the subject of Article VI, the applicants have no direct interest in the present matter. Their only potential interest is indirect to the extent that the quantity and priority dates of non-Indian present perfected rights could affect the amount of water applicants would receive in time of extreme water supply shortage. However, this interest is addressed by subordination language (to be discussed later) that allows Indian Tribe rights to be satisfied ahead of all major non-Indian rights, those very rights that applicants now challenge as spurious. Thus, it is difficult to see what remaining interest, even an indirect one, applicants have in the matter now before the Court.

3. Even if Applicants Have an Interest, It Cannot Be Said as a Practical Matter That This Interest Might Be Impaired by Entry of a Supplemental Decree.

If this requirement is construed to mean no more than that the applicants must be bound *res judicata* to a Supplemental Decree entered under Article VI, then applicants meet the requirement. As the United

States Solicitor General has noted in his letter to Ms. Veronica L. Murdock (Applicants' Motion, Appendix A), applicants will be bound by any decree entered by this Court that applies to the United States as a party. *Pueblo of Picuris v. Abeyta* (10th Cir. 1931) 50 F.2d 12.

Nevertheless, it cannot be said as a practical matter that protection of the applicants' interest or the interest itself might be impaired by entry of a Supplemental Decree with subordination language. As we will soon show, no Indian Tribe right, either decreed or claimed, will be impaired by entry of said Supplemental Decree; nor will the ability to assert and protect said rights be impaired.

4. Whatever Interest Applicants Have Is Being Adequately Represented by an Existing Party, the United States.

Even if the first three requirements are satisfied, the right to intervene does not lie if the applicants are adequately represented by an existing party. Applicants may not have the burden of proof on this issue, but in the present matter the evidence is conclusive that they are more than adequately represented by an existing party, the United States.

Legal representation of Indian Tribes by the United States is an aspect of the plenary power of the United States to manage the affairs of Indians and Indian Tribes. *Worcester v. Georgia* (1832) 6 Pet. 515; *United States v. Kayama* (1886) 118 U.S. 375; *United States v. Ramsey* (1926) 271 U.S. 467. This Court recognized the complete control of the United States over Indian litigation in *Heckman v. United States* (1912) 224 U.S. 413 at 444-445:

“There can be no more complete representation than that on the part of the United States in acting on behalf of these dependents—whom Congress, with respect to the restricted lands, has not yet released from tutelage. Its efficacy does not depend upon the Indians’ acquiescence.”

Whether representation of applicants’ interest is inadequate due to a conflict of interest is, at best, a theoretical argument only. As a practical matter, the United States has represented applicants’ interest without qualification throughout this lawsuit. In discussing the adequacy of United States’ representation, the State parties cannot presume to know the legal judgments, strategy, and tactics used by the United States in representing the applicants’ interest. The State parties can, however, attest to the general conduct of the litigation and to the results of that conduct.

Throughout this lawsuit, the United States has strongly espoused the Indian Tribes’ interest. The Court’s 1963 Opinion and 1964 Decree reflected this advocacy in a decision considered by all the State parties as well as the applicants (Applicants’ Brief p. 2) to be favorable to the Tribes. The Court reaffirmed the *Winters* doctrine of reserved water rights and awarded the five Lower Colorado River Indian Tribes water rights to approximately 900,000 acre-feet of annual diversions, even though much of this quantity had never been put to use.

In the post-1964 developments under Article VI of the Decree, the United States has continuously taken positions in support of the interest of the Tribes. The State parties are convinced, in fact, that failure to reach a final agreement under Article VI in the five

years since 1973, when agreement was reached on individual claims, has been due largely to demands made by the United States on behalf of the Tribes. As noted in the Joint Motion of May 2, 1977, the State parties contend that some of these demands have been excessive and beyond the scope of Article VI. Certainly, such a record belies any claim of inadequate representation.

Beyond the general conduct and results so far, we must look to the product of United States representation under Article VI. As noted earlier, that is the only matter presently before this Court, and the State parties contend that the right to intervene must be determined within the scope of Article VI, the applicants' real interest or lack thereof in it, and the adequacy of representation with regard to it. The State parties contend that representation as to all aspects of the lawsuit is adequate but for purposes of this Motion need only be examined with respect to Article VI.

The Proposed Supplemental Decree, together with modifications suggested by the United States in its Response of November 1977, adequately protects applicants' interest.¹ First, the fact that it does *not* attempt to list and resolve claims to additional present perfected rights for Indian Tribes is appropriate and consistent with Article VI. As argued, *supra*, Article VI does not contemplate listing and resolving such claims. In 1964, this Court had just completed calculation of irrigable acreage in the Opinion and Decree. It had

¹While the States parties have not yet reached complete agreement with the United States as to all the suggested modifications, the areas of difference are narrowing, and the State parties are hopeful of a rapid resolution.

also just decided *not* to rule at that time on boundary disputes concerning the Colorado River and Fort Mojave Indian Reservations (373 U.S. 546, at 601) but had provided in Article II (D)(5) of the Decree for adjustment of the decreed rights of those reservations in the event that the disputes were settled. In view of this, it is illogical to suppose that this Court then turned around and contemplated either recalculation of irrigable acreage or resolution of boundary disputes within its two year mandate under Article VI. This becomes even clearer in view of Article IX in which this Court gave all parties the broad right to seek modification of the Decree. Article IX provides:

“Any of the parties may apply at the foot of this decree for its amendment or for further relief. The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy.”

If recalculation of irrigable acreage were ever appropriate, then Article IX would be the proper vehicle, not Article VI. Whenever it became appropriate to resolve the present perfected rights associated with boundary disputes on any of the five Reservations, then Article II or Article IX would also be the proper vehicle, not Article VI.

The Proposed Supplemental Decree together with suggested modifications, does not affect applicants' interest under Articles II(D)(5) and IX. It is, in fact, explicit on this point:

“(2) This determination shall in no way affect future adjustments resulting from determinations

relating to settlement of Indian reservation boundaries referred to in Article II(D)(5) of said Decree.

“(3) Article IX of said Decree is not affected by this list of present perfected rights.”

So the Proposed Supplemental Decree not only neither limits nor denies any additional claims of applicants; it explicitly reaffirms the means through which those claims can be resolved.

The Proposed Supplemental Decree, together with suggested modifications, goes even further, however. As noted, *supra*, the applicants had a potential indirect interest in Article VI to the extent that the quantity and priority dates of non-Indian present perfected rights could affect the amount of water applicants would receive in the event of extreme shortage. The Proposed Supplemental Decree, with modifications, addresses this interest through subordination language that allows all Indian present perfected rights to be satisfied ahead of all major non-Indian rights in time of shortage. Applicants claim that the major non-Indian claims are spurious, but every right they claim to be spurious will be subordinated to every Indian right under the subordination language. Furthermore, the Indian rights to be so advantaged include not only those present perfected rights already quantified in the Decree, but also any present perfected rights quantified in the future as the result of boundary dispute resolutions.

The State parties deny that any of the non-Indian present perfected rights claims are spurious, whether as to property description, acreage, quantity of water right, or priority date. Nevertheless, even if the appli-

cants' allegations were true, the applicants would not be prejudiced in any way since all their rights would be satisfied ahead of any major non-Indian rights whenever there was not enough water to satisfy all present perfected rights.

In fact, as argued in the Joint Motion of May 2, 1977 (pp. 23-24, 28-30), the Indian present perfected rights are actually given a legal benefit by the subordination language. The language was designed in response to a contention that the doctrine of relation-back, on which the priority dates of non-Indian present perfected rights were based, did not apply vis-a-vis Indian reservations. The subordination language renders irrelevant any major non-Indian priority date as far as Indian rights are concerned. That said language actually confers a legal benefit is due to the fact that some of the major non-Indian present perfected rights would have earlier priority dates than those of the Indians (as decreed by this Court) even without applying the doctrine of relation back. On the other hand, even if the Indian rights were deemed to have immemorial priority dates, which the State parties deny, they would be no better off vis-a-vis the major non-Indian rights than they are under the subordination language.

The applicants claim, however, that the Proposed Supplemental Decree is ambiguous in two respects and that therefore their interest is compromised. The applicants are mistaken. First, the subordination language concerns the order in which present perfected rights are satisfied in the event that there is not even enough water available to satisfy all present perfected rights. If not all present perfected rights can be satisfied,

then the Indian rights will be satisfied first. If there is enough water to satisfy all present perfected rights, but not enough to satisfy 7,500,000 acre-feet, then it does not matter *which* present perfected rights are satisfied first, since there is enough water to satisfy all of them and they all have a priority over non-present perfected rights under the Decree. There is no ambiguity and applicants' interest is protected.

Second, the Proposed Supplemental Decree provides that as to additional rights for enlarged reservation boundaries,

“mainstream water shall not exceed the quantities necessary to supply the consumptive use required for irrigation of practicably irrigable acreage. . . .”

Article II (D)(1)-(5) of the Decree lists Indian present perfected rights in terms of a dual limitation, *either* a quantified number of acre-feet of diversions, *or* the quantity of water necessary to supply consumptive use required for irrigation of a quantified number of acres and satisfaction of related uses, *whichever is less*. Since this is a dual limitation, the right cannot be greater than either alternative, and therefore the Proposed Supplemental Decree accurately states that it cannot exceed the quantity of water necessary to supply consumptive use. The Proposed Supplemental Decree does not include a quantified number of acres, however, because the number of irrigable acres, which was calculated in the 1964 Decree, remains to be determined as to additional areas due to enlarged boundaries. The term “practicably irrigable acres” thus is substituted for an actual number of acres and sets the same standard for the calculation of irrigable acres as was used by

the Master for the reservation boundaries in the 1964 Decree.

The evidence is indeed conclusive that whatever interest applicants have in the present matter under Article VI is being adequately represented by the United States. The Proposed Supplemental Decree, together with suggested modifications, properly includes only those Indian present perfected rights already decreed by this Court. However, it does not in any way deny or prejudice any Indian claims to additional present perfected rights and explicitly reaffirms the proper means to assert those rights. It eliminates any prejudicial potential of allegedly spurious non-Indian present perfected rights through effective and unambiguous subordination language which actually confers a legal benefit on applicants' interest. The test of adequate representation cannot be merely whether applicants get everything they want. The fact is that they are getting at least as much, if not more, than they could reasonably expect out of Article VI and that the United States has continuously and effectively espoused their interest in this matter.

The State parties conclude that applicants have certainly not met all four requirements, if any, for intervention as a matter of right under Federal Rule 24(a) (2). Applicants' attempt to raise the issue of judicial economy as a reason for granting intervention (Applicants' Motion, p. 4) is not persuasive. In deciding the right to intervene, this Court may possibly consider the possible economy of resolving several conflicts in one proceeding through intervention. 3 B. Moore's Federal Practice 24-285. In this instance, however, there would not be economy, but rather more litigation.

Allowing intervention in the Article VI proceedings would likely preclude any chance of resolving non-Indian present perfected rights short of full litigation. The applicants would apparently challenge all non-Indian claims in spite of effective subordination language (Applicants' Brief, p. 14). Thus, there would be needless litigation over non-Indian rights in addition to litigation over additional Indian claims.

B. Applicants Do Not Qualify for Permissive Intervention Under FRCP 24(b).

Section (b) of FRCP 24 deals with permissive intervention and allows it, upon timely application (1) in cases where a statute of the United States confers a conditional right to intervene and (2) in cases where an applicant's claim or defense and the main action have a question of law or fact in common. Subsection (1) is not applicable to this case. Subsection (2) may be, but even if it is, the Court in the exercise of its discretion is mandated to

“Consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.”

Rule 24(b)(2) thus establishes three requirements for permissive intervention. The application for intervention must:

- (1) be timely;
- (2) assert a claim or defense that has a question of law or fact in common with the action before the Court; and
- (3) show that intervention will not cause undue delay or prejudice.

1. The Indian Tribes' Application Is Not Timely.

As argued, *supra*, under the discussion on intervention as a matter of right, the application is not timely. This is even more obvious regarding permissive intervention where delay and prejudicial effect is an explicit factor to be considered by this Court.

2. There Are No Actual Questions of Law or Fact Common to Both the Application and the Matter Presently Before This Court.

The only matter presently before this Court is Article VI of the Decree, and that Article only contemplates the determination of non-Indian present perfected rights. Applicants' concern with additional Indian rights raises different questions of fact than those before the Court. Also, Indian present perfected rights have a different legal basis than non-Indian rights in that they are based on the *Winters* doctrine of reserved rights and do not depend on prior use, as do non-Indian rights. Thus, there are different questions of law.

3. Intervention Would Unduly Delay and Prejudice the Adjudication of the Rights of the State Parties.

As noted earlier, applicants' intervention in the Article VI proceedings would likely preclude any chance of resolving non-Indian present perfected rights short of full litigation. This would obviously delay resolution under Article VI and would constitute undue delay since the applicants have no interest in the non-Indian claims because of subordination language that fully protects them.

Furthermore, intervention would prejudice the State parties. They would not only be delayed in obtaining their decreed rights under Article VI but would be

forced into the wholly needless expenditure of time and money to prove those rights in court and defend the claims against applicants' denials. The State parties have waited fourteen years to get their present perfected rights decreed and have already gone through the process of having their respective claims carefully scrutinized by the other parties. The claims that survived this examination are only those which all parties, including the United States, agreed were valid. To subject these claims to another test would be needless, time-consuming, and unfair, and would, in no event, result in the applicants' interest being any more advantaged than it would be already under the subordination language.

The State parties therefore contend that applicants do not meet the requirements for permissive intervention, and that in any case, no valid grounds exist upon which this Court should exercise its discretion to allow intervention.

C. Applicants May Not Have Complied With the Procedural Requirements of FRCP 24(c); if They Are Given More Time to Comply, the State Parties Should Be Given Adequate Time for an Additional Response.

Section (c) of FRCP 24 requires that a person desiring to intervene shall serve a motion upon the parties and that

“[T]he motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought.”

Applicants have filed a document entitled “Motion” and another entitled “Brief” but there is no separate

pleading, such as a petition or complaint in intervention, that accompanies the motion. Whether applicants have met the requirements of Rule 24(c) by the contents of their motion is apparently uncertain to them in view of their request for an additional sixty (60) days to file a "full petition in intervention." (Applicants' Motion, p. 3.)

The State parties doubt whether applicants have complied with Rule 24(c). However, if this Court allows them sixty (60) days additional to rectify this defective filing, the State parties would request an appropriate time thereafter within which to file an additional response.

IV

ANY CLAIMS OF APPLICANTS, NOT BARRED BY RES JUDICATA, TO ADDITIONAL PRESENT PERFECTED RIGHTS CAN BE RESOLVED IN SEPARATE PROCEEDINGS UNDER THE 1964 DECREE.

A. Res Judicata Bars Any Recalculation of Irrigable Acreage Within the 1964 Reservation Boundaries.

As argued, *supra*, Article IX would be the appropriate vehicle for seeking recalculation of irrigable acreage, if such recalculation were appropriate. The State parties contend, however, that it is not. The number of irrigable acres within the Indian Reservation boundaries, as they existed in 1964, was fully tried before the Master and this Court and the five Lower Colorado River Indian Tribes were adequately represented throughout by the United States. The Court determined the number of irrigable acres within each Reservation boundary, and the result was a total of approximately 900,000 acre-feet in present perfected rights, an out-

come favorable to the Tribes. The State parties contend, therefore, that the elements of *res judicata* exist and bar relitigation of this issue.

B. Present Perfected Rights Claims Associated With Boundary Disputes Can Be Resolved Under Article II and/or Article IX.

As argued, *supra*, Articles II and/or IX are the proper vehicles for resolving present perfected rights associated with Reservation boundary disputes. In contrast to the recalculation of irrigable acreage, however, these matters were not determined by this Court in its 1964 Decree, and therefore *res judicata* is no bar to their resolution in the future.

The State parties disagree with applicants' interpretation of which, if any, boundary disputes have been finally determined. Whether several of the lower court decisions applicants refer to constitute final boundary determinations for purposes of asserting present perfected rights depends on the issues that were necessarily resolved by those decisions.

The State parties object, however, to any assertions that orders of the Secretary of the Interior finally determine Indian Reservation boundaries. Secretarial Orders are functional for Department of Interior administrative purposes, but not for purposes of use as the bases for asserting water rights which impinge on those of the State parties. The State parties are entitled to a court determination of the validity of Reservation boundary claims recognized by Secretarial Orders.

The same reasoning applies to the Opinion of Interior Solicitor Austin, M-36886 (January 18, 1977),

which reaffirmed the Opinion of Solicitor Margold, M-28198 (January 8, 1936), deciding the Fort Yuma Indian Reservation boundary dispute adversely to the Quechan Indians' claim. Applicants neglect to mention the Austin Opinion (Applicants' Motion, p. 15), implying instead that the Solicitor's office at Interior had not resolved the question. The State parties recognize, however, that even though Solicitor Austin did issue the Opinion, that it did not constitute a final determination of the dispute.

Conclusion.

For the reasons discussed above, applicants' Motion for Leave to Intervene as Indispensable Parties should be denied and the existing parties should be allowed to continue attempts to meet the mandate of Article VI of the 1964 Decree. If applicants are allowed time to file additional pleadings in support of intervention, the State parties should be allowed an appropriate time within which to file an additional response.

DATED: January 25, 1978.

Respectfully submitted,

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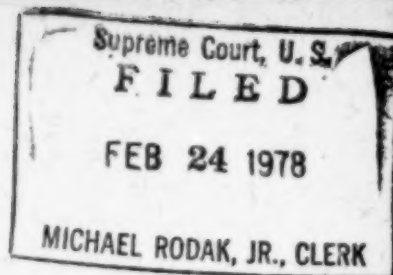
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By DOUGLAS B. NOBLE,

Service of the within and receipt of a copy
thereof is hereby admitted this day
of January, A.D. 1978.



No. 8, ORIGINAL

In the Supreme Court of the United States

OCTOBER TERM, 1977

STATE OF ARIZONA, COMPLAINANT

v.

STATE OF CALIFORNIA, ET AL.

ON MOTION FOR LEAVE TO INTERVENE

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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JAMES W. MOORMAN,

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 8, ORIGINAL

STATE OF ARIZONA, COMPLAINANT

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ON MOTION FOR LEAVE TO INTERVENE

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In May 1977, Arizona, Nevada, California and seven California public agencies (the state parties) filed a joint motion for a determination of their present perfected rights under Article VI of the decree entered in this case on March 9, 1964, 376 U.S. 340, 351-352, and amended on February 28, 1966, 383 U.S. 268. The United States, which has participated throughout this litigation on behalf of the five tribes along the lower Colorado River, responded to this motion in November 1977. The issues raised in the Joint Motion and the response of the United States are restricted to matters relating to the determination of the non-Indian present perfected rights under Article VI.

Now three of the five lower Colorado River tribes—the Quechan Tribe of the Fort Yuma Reservation, the Fort Mojave Tribe, and the Chemehuevi Tribe (the Three Tribes)—have moved to intervene as “[i]ndispensable [p]arties.” Their motion states the following grounds: the tribes are the real parties in interest; the representation of their interests by the United States is and has been inadequate; the proposed supplemental decree is patently ambiguous; the United States’ response does not set forth the status of certain boundary disputes; the United States’ response fails to make any claims for certain lands “omitted” from the Court’s original decree; and the present perfected rights claimed by the movants have no basis in fact. The applicants in intervention did not attach a proposed complaint in intervention to their motion (see Rule 9 of this Court and Rule 24, Fed. R. Civ. P.), and their motion requested (Mot. 18) that they be permitted to file such a petition within sixty days after the grant of their motion.

I. THE TRIBES’ CLAIM TO BE INDISPENSABLE PARTIES

The Three Tribes contend that they should be permitted to intervene because they are the real parties in interest (and thus indispensable parties), and that the government’s representation of their interests is and has been wholly inadequate.

The United States is fully in accord with the Three Tribes’ assertion that they are the beneficial owners of water rights reserved by the United States at the time it established their reservations. See *Winters v.*

United States, 207 U.S. 564. As the Three Tribes acknowledge (see Br. 5-6), the United States' complaint in intervention stated that the United States "as trustee for the Indians and Indian Tribes" claimed "on their behalf rights to the use of the water from the Colorado River and its tributaries in the River Basin" (Complaint, ¶ 27). As this Court's opinion demonstrates, the United States successfully contended that the Tribes were entitled to substantial reserved water rights. See *Arizona v. California*, 373 U.S. 546, 595-601.

However, although we agree that the Three Tribes have a beneficial interest in the water rights claimed by the government on their behalf, we do not agree that this interest establishes that they are indispensable parties. To the contrary, the decisions of this Court recognize that the United States as trustee has standing to bring suit to protect or enforce such rights, and that at least in the absence of conflict of interest¹ this representation of the tribal interests is "complete." *Heckman v. United States*, 224 U.S. 413, 444-445.

The Three Tribes recognize the United States' trusteeship status (Br. 14-15), but they urge that they should be permitted to intervene and represent their own interests because the representation of the United States has been inadequate due to pervasive conflicts of interests in both the Department of Justice and

¹ Compare *State of New Mexico v. Aamodt*, 537 F.2d 1102 (C.A. 10), with *Pueblo of Picuris v. Abeyta*, 50 F.2d 12 (C.A. 10).

the Department of the Interior. Although they allege that the government's conduct of the case from the outset has been inadequate,² the Tribes' primary submission is that the government's response to the Joint

²In addition to general allegations that the government has succumbed to adverse political pressures (Br. 5-6), the brief contains two specific allegations of past malfeasance by government attorneys. First, the Tribes quote an affidavit alleging that government attorneys "abandoned the Tribes' interests and vigorously advocated the conflicting claims of joint movants Yuma and Gila Federal Reclamation Projects" (Br. 7); second they cite a memorandum allegedly proving "beyond a question" that conflicts of interest precluded the Tribes from having their day in court (Br. 29 and n. 61). Although both the affidavit and the memorandum to which the Tribes refer were prepared by Bureau of Indian Affairs employees, the views expressed in these documents do not represent the position of the Department of the Interior. Nor, in our view, do these charges reveal an actual conflict of interests. The United States' primary undertaking in the instant case was the presentation of the Indian claims. The only other rights advanced by the United States and ultimately determined by the Court were for the Imperial National Wildlife Refuge, the Lake Mead Recreation Area, the Havasu Lake National Wildlife Refuge, and the satisfaction of the United States' obligations under its treaty with Mexico dated February 3, 1944, 59 Stat. 1219. Of those claims, only the treaty claim involved a substantial amount of water (normally 1.5 million acre-feet per year, half of which would be supplied by the upper basin in times of shortage). 59 Stat. 1237. However, the rights of United States to water to satisfy its treaty obligation was virtually indisputable; indeed no party in the litigation sought to challenge that claim. Moreover, that right could conflict with the tribal rights only in the event of extreme shortage.

We therefore believe that the motion to intervene is grounded less on charges of conflicting interests than on disagreements with the wisdom of various judgments necessarily made in the course of developing a litigation strategy. Although we believe that the government's conduct of this litigation has been competent and fully in accord with its fiduciary obligations, we do not believe it would

Motion demonstrates the gross inadequacy of its representation of their interests. We therefore address in turn each of the points upon which they rely to establish this inadequacy.

II. ALLEGATIONS OF PATENT AMBIGUITIES

The Tribes' chief argument (Mot. 6-9; Br. 16-22) is that the proposed supplemental decree is patently ambiguous. The Tribes argue that paragraph 5 of the proposed decree, the subordination agreement, does not ensure the priority of their present perfected rights. That paragraph provides that,

"In the event of a determination of insufficient mainstream water to satisfy present perfected rights pursuant to Article II(B)(3) of said decree, the Secretary of the Interior shall * * * first provide for the satisfaction in full of all the rights of the * * * Tribes.

The Tribes contend (Br. 16), however, that the final decree contains "no provision relating to 'insufficient mainstream water to satisfy present perfected rights,' " and therefore a patent ambiguity exists which leaves their rights open to challenge.

be feasible or appropriate at this stage of the proceedings to describe fully and seek to justify the judgments made regarding the strategy of the litigation and method of presentation of evidence to the Special Master approximately twenty years ago. A separate action presenting any such claims of breach of trust, if timely and authorized by statute, would be the appropriate forum for the development of the necessary record to permit the adjudication of such charges. See *United States v. Mason*, 412 U.S. 391, 398-399; 28 U.S.C. 1505.

In our view there is no ambiguity. Article II(B) provides for all possible contingencies. Articles II(B)(1) and (2) of the decree, 376 U.S. 342, provide for all instances in which sufficient mainstream water exists to satisfy 7,500,000 acre-feet of annual consumptive use. Where Article II(B)(1) and (2) apply, Article II(D) provides for the satisfaction of the Tribes' present perfected rights out of the 7,500,000 acre-feet. Article II(B)(3) provides for the remaining instances—in which insufficient mainstream water is available to satisfy 7,500,000 acre-feet of consumptive use—and in that circumstance Article II(B)(3) requires the Secretary to provide for the satisfaction of all present perfected rights before apportioning the remaining available water.³ Although Article II(B)(3) provides that the Secretary is to provide for present perfected rights “in order of their priority date without regard to state lines,” paragraph 5 of the proposed supplemental decree alters this order of priority by providing

³ Article II(B)(3) provides:

“If insufficient mainstream water is available for release, as determined by the Secretary of the Interior, to satisfy annual consumptive use of 7,500,000 acre-feet in the aforesaid three States, then the Secretary of the Interior, after providing for satisfaction of present perfected rights in the order of their priority dates without regard to state lines and after consultation with the parties to major delivery contracts and such representatives as the respective States may designate, may apportion the amount remaining available for consumptive use in such manner as is consistent with the Boulder Canyon Project Act as interpreted by the opinion of this Court herein, and with other applicable federal statutes, but in no event shall more than 4,400,000 acre-feet be apportioned for use in California including all present perfected rights.”

that the Tribes' rights shall be satisfied "first." Accordingly, in our view no ambiguity exists, and the proposed supplemental decree provides for the priority of the affected Indian water rights without regard to their priority date in all cases where there is a shortage of mainstream water, and Indian rights, though perfected, might not otherwise be satisfied.

The State parties' response to the Tribes' motion to intervene indicates that they concur in this interpretation of the subordination agreement. They represent that the proposed supplemental decree "with [the United States'] modifications, * * * through subordination language * * * allows all Indian present perfected rights to be satisfied ahead of all major non-Indian rights in time of shortage" (St. Resp. 17).

The Tribes also suggest (Br. 20-22) that a second ambiguity arises from a comparison of the language of the proposed supplemental decree as to use in diversion, with the language of Article II(D)(1)-(5), which in the case of each of the Tribes describes the entitlements to "present perfected rights" as follows:

* * * in annual quantities not to exceed (i) * * * acre feet of diversions from the main stream or (ii) the quantity of main stream water necessary to supply the consumptive use required for irrigation of * * * acres and for satisfaction of related uses, whichever of (i) (ii) is less, with a priority date of * * *.

The amendment to paragraph 5 proposed in the United States' response to the Joint Motion (U.S. Resp. 3), however, provides that main stream water for additional areas determined to be within tribal reservations shall not exceed the quantities—

* * * necessary to supply the consumptive use required for irrigation of the irrigable acres * * *.

The language in the proposed supplemental decree, instead of the language in the original decree, was adopted for the very practical reason that the parties are unable at this time to specify the number of practicably irrigable acres included within the areas subject to boundary disputes resolved since the entry of the Court's decree. As a result, the total number of acre feet of diversions cannot be specified. The use of the proposed language, in our view, provides a workable definition in the absence of the information required to compute the total number of acre feet of diversions. We believe that the Tribes' entitlement to water under the proposed language (which is based upon the second test of the original decree) cannot be less than it would be under the dual standard of the original decree, since the decree specifies that the Tribes are entitled only to the application of whichever of the two formulas provides less. The language proposed is used only because of lack of the proper data to enable the parties to use the dual standard set forth in the original decree.

III. BOUNDARY DISPUTES

The Tribes also contend (Mot. 9-15; Br. 23-28) that the government's response to the Joint Motion is inadequate in that it fails to address the issue of disputes concerning the boundaries of tribal lands. The Tribes argue that the supplemental decree should make provision for water rights in areas recognized

as part of the tribal reservations⁴ as a result of the resolution of boundary disputes occurring since the filing of the original decree. We agree that these rights ultimately must be determined, and we intend at an appropriate time to file a motion with this Court seeking a determination of these rights. Such a motion would not, however, be brought under Article VI, but rather under Article II(D) and Article IX of the original decree. The present proceeding is limited to issues involving Article VI of that decree. In our view, substantial benefits will accrue to the Tribes if the present efforts to resolve the controversy under Article IV succeed, and tribal rights that may be subject to future proceedings are in no way jeopardized or affected.

Indeed, the State parties' response to the Tribes' motion to intervene expressly acknowledged that the proposed decree does not affect the Tribes' rights to raise claims resulting from boundary disputes under Articles II and IX (St. Resp. 15-16). As the State parties note (*id.* at 16-17), the proposed decree is explicit on this point. Paragraphs 2 and 3 provide:

- (2) This determination shall in no way affect future adjustments resulting from determinations relating to settlement of Indian reservation boundaries referred to in Article II(D) (5) of said Decree.

⁴In large part the motion of the Three Tribes concerns the boundaries of the Colorado River Indian reservation (Mot. 11-13); the Colorado River Tribe, however, has not at this time moved to intervene.

(3) Article IX of said decree is not affected by the list of present perfected rights.

Moreover, as noted in our original response to the Joint Motion (U.S. Resp. 4-5), the language proposed by the United States for paragraph 5 (the subordination agreement) is intended to apply to additional areas determined to be within the boundaries of the reservations. The State parties accept this interpretation; in their response to the intervention motion they state that the Indian rights "advantaged" by the subordination "include not only those present perfected rights already quantified in the decree, *but also any present perfected rights quantified in the future as a result of boundary dispute resolutions*" (St. Resp. 17; emphasis added).

We believe that treating Article VI matters separately from rights affected by boundary disputes is in accord with this Court's distinction between Article VI matters, as to which it directed the parties to file lists of their claims within three years, 383 U.S. 268-269, and boundary disputes, upon which the Court declined to rule. *Arizona v. California*, 373 U.S. 546, 601.

IV. OMITTED LANDS

The Tribes also contend (Mot. 16) that the government's response to the Joint Motion is inadequate in that it fails to make any claims for "omitted" lands, *i.e.*, those for which no evidence was presented to the Special Master. At present there is not sufficient hydrological and technical data to adjudicate these

claims. However, we believe, as in the case of lands ultimately determined to be within reservation boundaries, that adoption of the proposed supplemental decree under Article VI in no way forecloses a later claim for such lands under Article IX.

V. TRIBAL OBJECTIONS TO PRESENT PERFECTED RIGHTS CLAIMED BY THE STATE PARTIES

The Tribes deny (Mot. 17) the validity of the State parties' claims to present perfected rights. We do not agree with the Tribes' allegations that the dates and amounts claimed are patently false; however, as noted in our response to the Joint Motion, we accept these claims only conditionally as part of a stipulation including an agreement subordinating all these state rights to the Tribes' present perfected rights.

VI. CONCLUSION

As the foregoing demonstrates, the United States has no governmental interests which conflict with those it is asserting on behalf of the Tribes in this proceeding under Article VI.⁵ Throughout the negotiations on this subject over the past several years, the primary aim of the United States has been to insure that the rights of the five lower Colorado River tribes, including those of the applicants in intervention, are fully protected. The purpose of the proposed sub-

⁵ The only federal present perfected rights (other than those claimed on behalf of the tribes) listed in the proposed supplemental decree are a diversion right of 1,140 acre feet (with a priority date of 1915) for a parcel of land in Arizona (Pro. Supp. Decree 8), and a diversion right of 500 acre feet (with a priority date of 1929) for the Lake Mead Recreation Area (*id.* at 18). We do not believe that the Three Tribes suggest the assertion of these minor claims creates any conflict.

ordination agreement is to establish by decree that the rights of the five tribes will be satisfied in times of shortage prior to all other present perfected rights except for a few miscellaneous rights.⁶ The United States is continuing its negotiations with the State parties seeking to achieve that purpose, consulting with the Tribes, and considering all the Tribes' comments as efforts to resolve this matter continue.

In light of the lack of conflict between the United States' interests and those of the Tribes, we believe their intervention at this late stage in the proceeding is unwarranted. An important additional consideration is the States' assertion (St. Resp. 4-7) of sovereign immunity. See *United States v. Minnesota*, 270 U.S. 181; *Cherokee Nation v. Georgia*, 5 Pet. 1. It may be that Arizona (the plaintiff) and Nevada (an intervenor), by asserting title to the water rights at issue and submitting that question for adjudication, have consented to determination of adverse claims with respect to the same *res* or asset. But that argument would not apply to California, New Mexico, or Utah, who were involuntarily made parties.

Accordingly, since the Tribes' interests are (and have been) fully represented by the United States and since the intervention of the Tribes at this late date might frustrate the complete adjudication of the competing claims, the motion to intervene should be denied. We urge the Court, however, in light of the

⁶ The proposed supplemental decree does not subordinate the Miscellaneous Present Perfected Rights (Pro. Supp. Decree 7-11, 12-18) to the rights of the Tribes. Those rights, however, total only 17,504 acre-feet of diversions, part of which are for municipal and industrial purposes. Most of those rights are minimal and not all are senior to the tribal rights.

Tribes' obvious interest in these proceedings, to permit the Tribes to submit their views as *amici curiae*.⁷

Respectfully submitted.

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MYLES E. FLINT,
Attorney.

FEBRUARY 1978.

⁷ Allowing the Tribes to participate as *amici curiae* is consistent with an earlier ruling by the Special Master on the request of several tribes other than the Three Tribes that the Attorney General be directed to appoint separate counsel for them, although they expressly disclaimed any desire to intervene (6 Tr. 2644). The Special Master ruled that although "[t]he legal power of the Attorney General to represent the petitioners and to manage the litigation in their behalf cannot be curtailed by judicial action," there was "some room for accommodation"; he concluded that the tribes could submit a brief at the conclusion of the hearing that would be similar to an *amicus curiae* brief (6 Tr. 2644-2646). We know of no instance in these proceedings in which a tribe did so.

IN THE
Supreme Court of the United States

Supreme Court, U. S.
FILED

FEB 28 1978

MICHAEL RODAK, JR., CLERK

October Term 1977
No. 8, Original of
October Term 1965

STATE OF ARIZONA,

Complainant,

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CITY OF SAN DIEGO, and COUNTY OF SAN DIEGO,

Defendants,

UNITED STATES OF AMERICA and STATE OF NEVADA,

Interveners,

STATE OF NEW MEXICO and STATE OF UTAH,

Impleaded Defendants.

**Reply of the States of Arizona, California, and Nevada
and the Other California Defendants to the Response of the United States to the Joint Motion
for a Determination of Present Perfected Rights
and the Entry of a Supplemental Decree**

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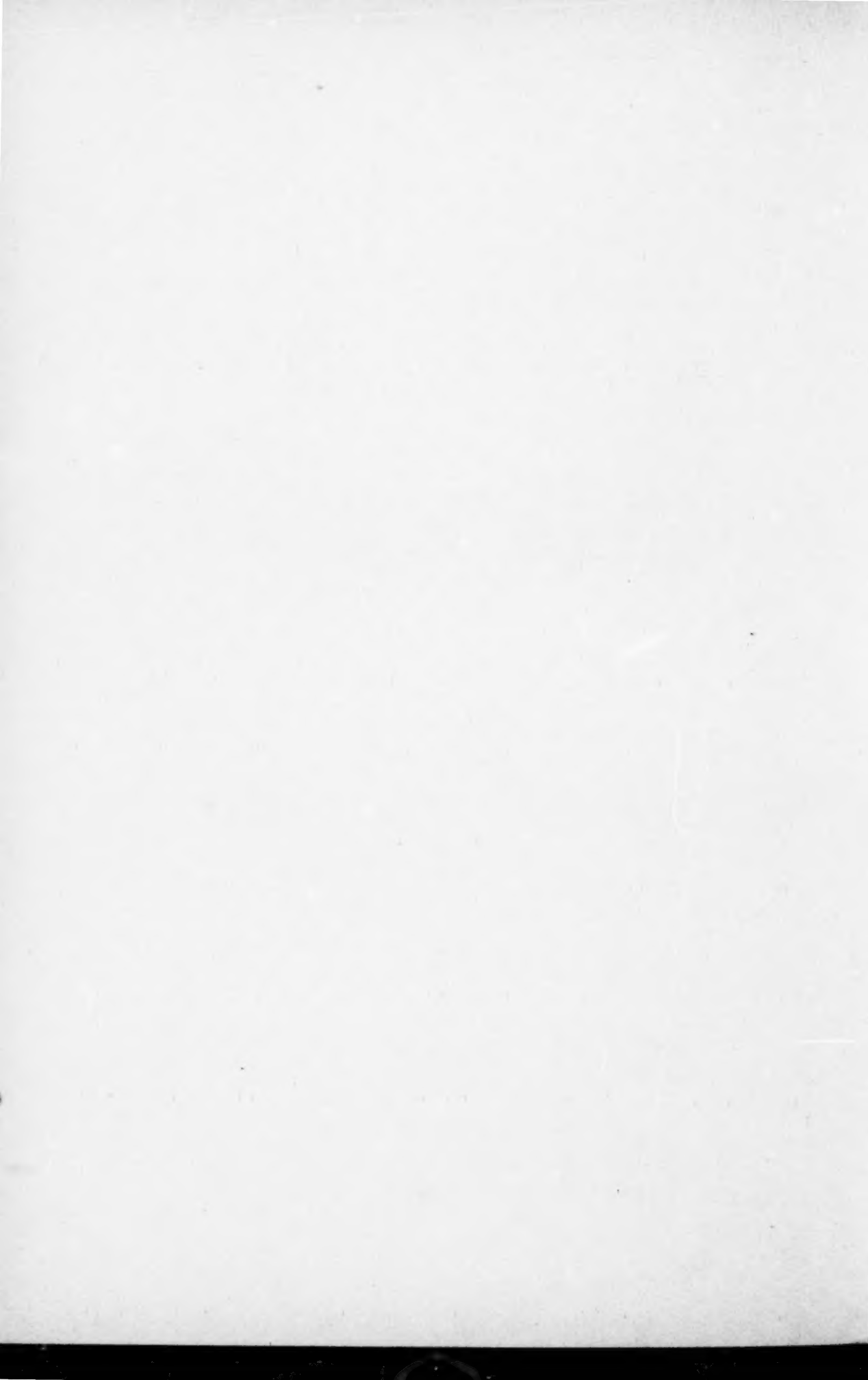
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IN THE
Supreme Court of the United States

October Term 1977

No. 8, Original of
October Term 1965

STATE OF ARIZONA,

Complainant,

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CITY OF SAN DIEGO, and COUNTY OF SAN DIEGO,

Defendants,

UNITED STATES OF AMERICA and STATE OF NEVADA,

Interveners,

STATE OF NEW MEXICO and STATE OF UTAH,

Impleaded Defendants.

**Reply of the States of Arizona, California, and Nevada
and the Other California Defendants to the Response
of the United States to the Joint Motion
for a Determination of Present Perfected Rights
and the Entry of a Supplemental Decree**

On May 2, 1977, the STATE OF ARIZONA, Complainant, the California Defendants (STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CITY OF SAN DIEGO, COUNTY OF SAN DIEGO), and STATE OF NEVADA, Intervener (hereinafter referred to collectively as the "State Parties"), filed a Joint Motion for a Determination of Present Perfected Rights and the Entry of a Supplemental Decree. That motion was made pursuant to Article VI of the Decree entered in this case on March 9, 1964, at 376 U.S. 340 (1964) and amended on February 28, 1966, at 383 U.S. 268 (1966) and was accompanied by a proposed supplemental decree which the State Parties asked this Court to enter.

In November 1977, the United States filed a Response to the Joint Motion in which it proposed certain amendments to the proposed supplemental decree offered by the State Parties. The United States urged entry of the proposed supplemental decree provided that the State Parties agreed to the proposed amendments. The State Parties hereby reply to the Response of the United States.

The State Parties agree to the proposed amendment to paragraph 4 of the proposed supplemental decree. That paragraph should now read as follows:

"(4) Any water right listed herein may only be exercised for beneficial uses."

The State Parties are unable to agree to all the language changes suggested for paragraph 5 by the

United States in its response. However, the United States and the State Parties have reached agreement on alternative language for paragraph 5, which should now read as follows:

“5. In the event of a determination of insufficient mainstream water to satisfy present perfected rights pursuant to Article II(B) (3) of said Decree, the Secretary of the Interior shall, before providing for the satisfaction of any of the other present perfected rights except for those listed herein as ‘MISCELLANEOUS PRESENT PERFECTED RIGHTS’ (rights numbered 7-21 and 29-80 below) in the order of their priority dates without regard to State lines, first provide for the satisfaction in full of all rights of the Chemehuevi Indian Reservation, Cocopah Indian Reservation, Fort Yuma Indian Reservation, Colorado River Indian Reservation, and the Fort Mojave Indian Reservation as set forth in Article II(D) (1)-(5) of said Decree, provided that the quantities fixed in paragraphs (1) through (5) of Article II(D) of said Decree shall continue to be subject to appropriate adjustment by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined. Additional present perfected rights so adjudicated by such adjustment shall be in annual quantities not to exceed the quantities of mainstream water necessary to supply the consumptive use required for irrigation of the practicably irrigable acres which are included within any area determined to be within a reservation by such final determination of a boundary and for the satisfaction of related uses. The quanti-

ties of diversions are to be computed by determining net practicably irrigable acres within each additional area using the methods set forth by the Special Master in this case in his Report to this Court dated December 5, 1960, and by applying the unit diversion quantities thereto, as listed below:

INDIAN RESERVATION	UNIT DIVERSION QUANTITY ACRE-FEET PER IRRIGABLE ACRE
Cocopah (Arizona)	6.37
Colorado River (California)	6.67
Chemehuevi (California)	5.97
Ft. Mojave (California)	6.46

The foregoing reference to a quantity of water necessary to supply consumptive use required for irrigation, and as that provision is included within paragraphs (1) through (5) of Article II(D) of said Decree, shall constitute the means of determining quantity of adjudicated water rights but shall not constitute a restriction of the usage of them to irrigation or other agricultural application. If all or part of the adjudicated water rights of any of the five Indian Reservations is used other than for irrigation or other agricultural application, the total consumptive use, as that term is defined in Article I(A) of said Decree, for said Reservation shall not exceed the consumptive use that would have resulted if the diversions listed in subparagraph (i) of paragraphs (1) through (5) of Article II(D) of said Decree and the equivalent portions of any supplement thereto had been used for irrigation of the number of acres specified for that Reservation in said paragraphs and supplement and for the satisfaction

of related uses. Effect shall be given to this paragraph notwithstanding the priority dates of the present perfected rights as listed below. However, nothing in this paragraph (5) shall affect the order in which such rights listed below as 'MISCELLANEOUS PRESENT PERFECTED RIGHTS' (numbered 7-21 and 29-80 below) shall be satisfied. Furthermore, nothing in this paragraph shall be construed to determine the order of satisfying any other Indian water rights claims not herein specified."

As a result of agreement on language for paragraphs 4 and 5, the United States and the State Parties are now in agreement on language for a proposed supplemental decree under Article VI listing "present perfected rights, with their claimed priority dates." The United States and the State Parties intend to file a joint motion for entry of such a decree, which would reflect the agreed-upon language. The United States has authorized the State Parties to inform the Court of its agreement to language for the decree and to the above procedure.

The State Parties hereby request that the Court allow thirty (30) days or whatever time it deems appropriate for filing of a joint motion by the United States and the State Parties.

DATED: February 27, 1978

Respectfully submitted,

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By DOUGLAS B. NOBLE.

Service of the within and receipt of a copy
thereof is hereby admitted this day
of February, A.D. 1978.

No. 8 Original

Supreme Court, U. S.
FILED

APR 7 1978

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1977

STATE OF ARIZONA,

v.

Complainant

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IM-
PERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY
WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTH-
ERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY
OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO,
CALIFORNIA,

Defendants

THE UNITED STATES OF AMERICA AND STATE OF NEVADA,

Interveners

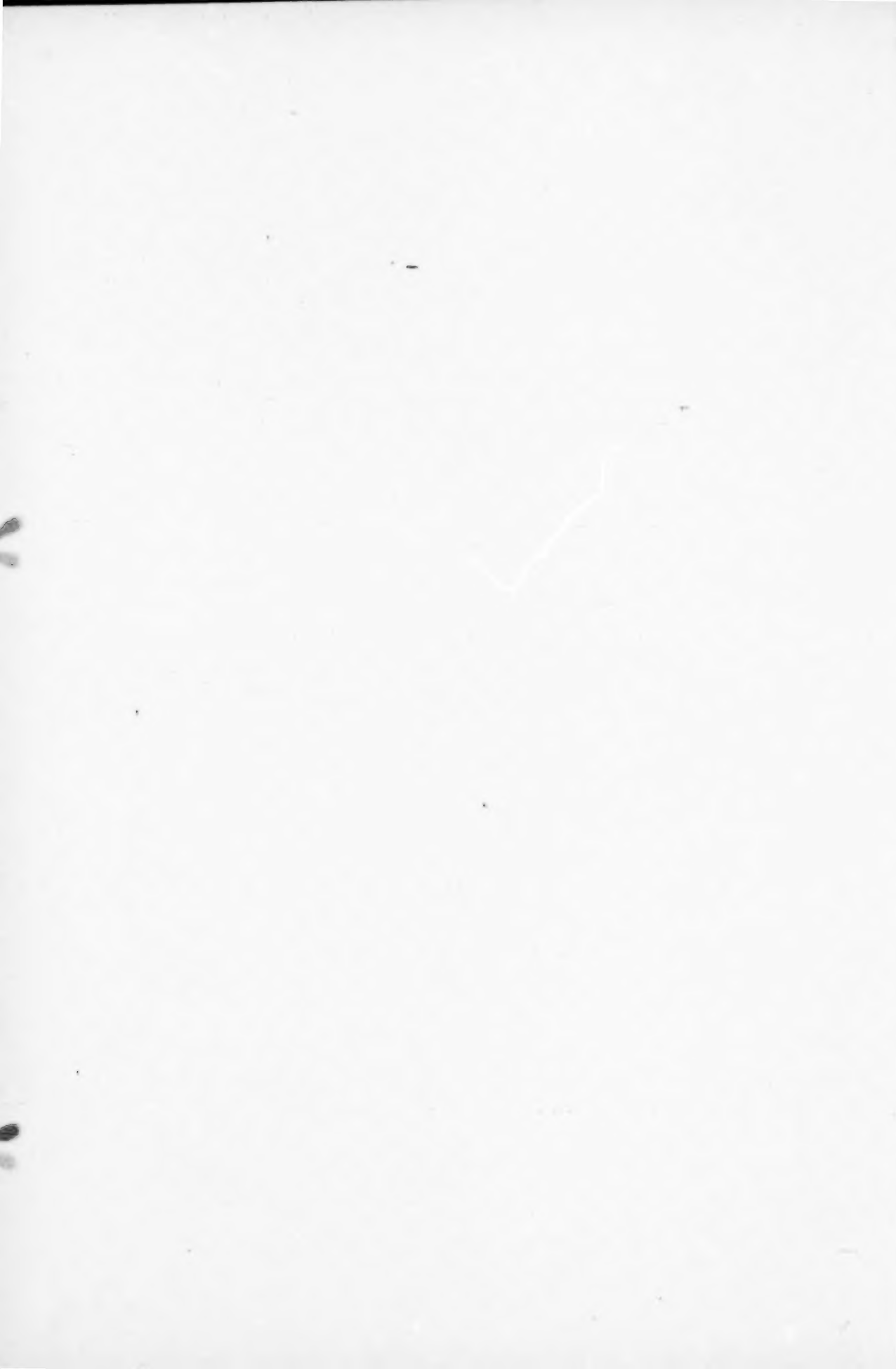
STATE OF UTAH AND STATE OF NEW MEXICO,

Impleaded Defendants

**PETITION OF INTERVENTION ON BEHALF OF THE
FORT MOJAVE TRIBE, THE QUECHAN TRIBE OF
THE FORT YUMA INDIAN RESERVATION, THE
CHEMEHUEVI INDIAN TRIBE, THE COLORADO
RIVER INDIAN TRIBES AND THE CONFEDERATION
OF INDIAN TRIBES OF THE COLORADO RIVER;
AND THE NATIONAL CONGRESS OF AMERICAN
INDIANS AS AMICUS CURIAE**

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the Quechan Tribe of the Fort Yuma
Indian Reservation, the Chemehuevi
Indian Tribe, the Colorado River
Indian Tribes and the Confederation
of Indian Tribes of the Colorado
River; and the National Congress of
American Indians as Amicus Curiae

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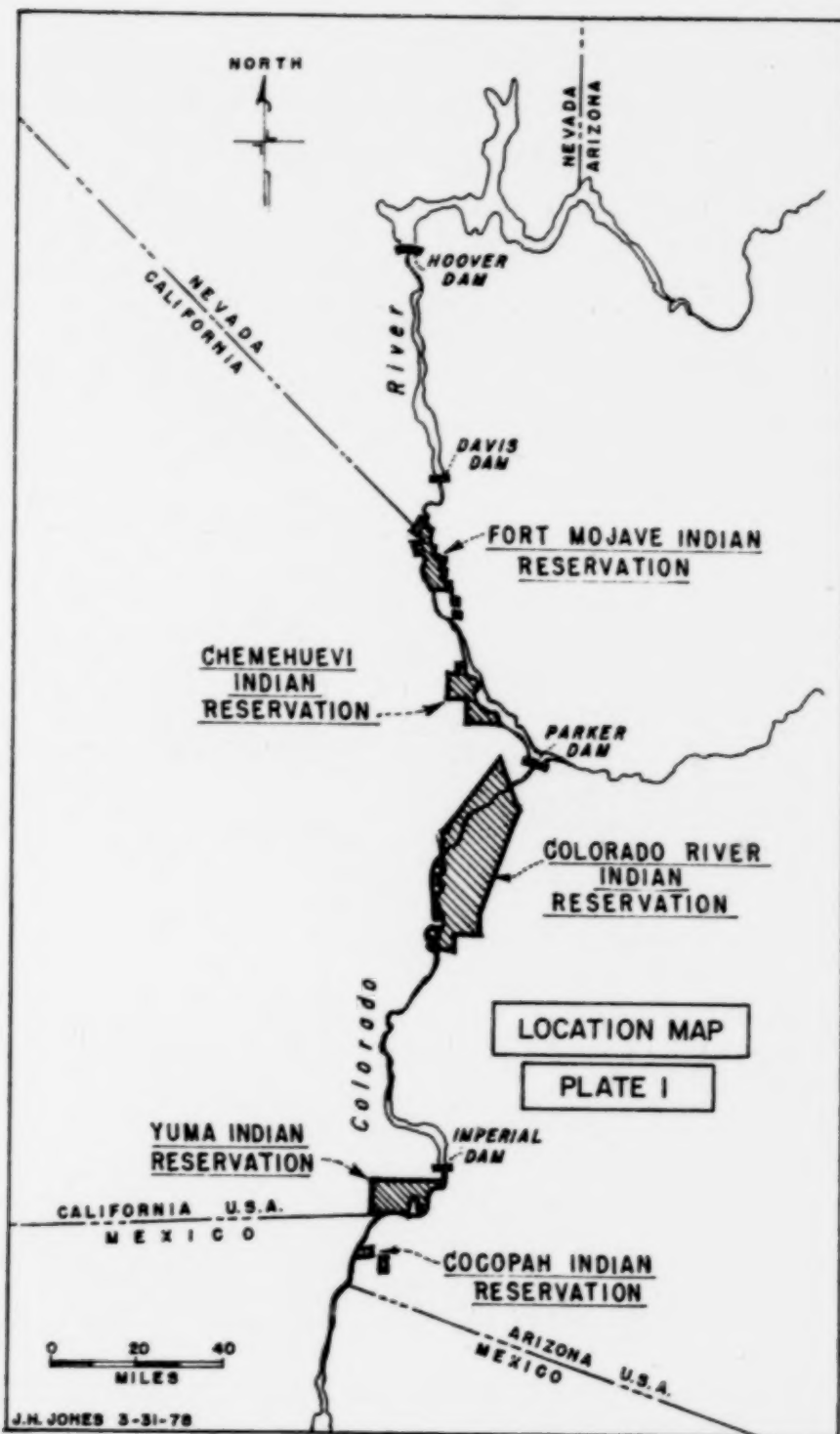
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1977

No. 8 Original

STATE OF ARIZONA,

v. *Complainant*

STATE OF CALIFORNIA, ET AL.,

Defendants

UNITED STATES OF AMERICA,

Intervener

**PETITION OF INTERVENTION ON BEHALF OF THE
FORT MOJAVE TRIBE, THE QUECHAN TRIBE OF
THE FORT YUMA INDIAN RESERVATION, THE
CHEMEHUEVI INDIAN TRIBE, THE COLORADO
RIVER INDIAN TRIBES,¹ AND THE CONFEDERATION
OF INDIAN TRIBES OF THE COLORADO RIVER;²
AND THE NATIONAL CONGRESS OF AMERICAN
INDIANS AS AMICUS CURIAE**

¹ It is extremely important to note that the original movants included only the Fort Mojave Tribe, the Quechan Tribe and the Chemehuevi Tribe. The Colorado River Tribes of the Colorado River Indian Reservation, States of Arizona and California, have joined the aforesaid Tribes as petitioners. That joinder, in this Petition, brings before the Court the vast proportion of "present perfected rights" as they pertain to the Indian irrigable acreage on the Lower Colorado River. Reference is made to p. 11, para. XXI of the December 23, 1977 Motion. There the claims of the Colorado River Tribes, to the extent those claims were known on December 23, 1977, were set forth. As there noted, the Colorado River Tribes were not movants.

² The Confederation of Indian Tribes of the Colorado River is a non-profit corporation organized pursuant to the laws of the State of California. The Fort Mojave Tribe, the Chemehuevi Tribe, the

Petition of Intervention³ on behalf of the Fort Mojave Tribe, the Chemehuevi Tribe, the Quechan Tribe and the Colorado River Tribes, together with the Confederation and the National Congress of American Indians, *amicus curiae*, and by leave first having had and obtained, file this Petition in the above-entitled cause, and allege and declare as follows.

I.

On December 23, 1977, the Fort Mojave Tribe, the Chemehuevi Tribe and the Quechan Tribe of the Fort Yuma Indian Reservation filed with the Court a motion petitioning to intervene in this case. Likewise filed on the same date was a brief in support of that motion. Both the motion and brief are incorporated into this Petition and are made a part of it by reference. In the motion, the movants alluded to the fact that time constraints prevented the filing at that time of a full Petition of Intervention. The Tribes requested sixty (60) days after the motion had been granted to file the full Petition.

II.

By a letter dated February 23, 1978, the Clerk of the Court advised the Tribes as follows:

Colorado River Indian Tribes, the Quechan Tribe and the Cocopah Tribe are all members of that non-profit corporation. The Confederation makes no claims to "present perfected rights" in this Petition. It is, however, a corporate entity through which the Tribes function. The Cocopah Tribe has refrained from joining in the Petition.

³ Although this pleading is entitled as a "Petition of Intervention," the Tribes are already parties by reason of the petition of the United States which was for itself and on behalf of the Tribes. See *Arizona v. California*, 373 U.S. 546, 595 (1963) which states: "The government, on behalf of the five Indian Reservations in Arizona, California, and Nevada asserted rights to water in the main-stream of the Colorado River [citations omitted]." Accordingly, the Tribes now in essence seek to be recognized not only as real parties in interest, but as parties litigant represented by their own counsel who will be effective and free from conflicts of interest.

"In connection with the motion of the Fort Mojave Indian Tribe, et al., for leave to intervene as indispensable parties, the Court has instructed this office to direct the parties in the above case as follows:

- "1. That the Fort Mojave Indian Tribe, et al., file a full petition of intervention within 45 days from the date of this letter."

III.

Substance of the Tribes' motion of December 23, 1977, is as follows:

A. The subject matter or res of the case of *Arizona v. California* is the respective "present perfected rights" to the use of water of the various principal claimants in and to the Lower Colorado River. The Tribes are owners of full equitable title in and to "present perfected rights" and refer, in that connection, to a portion but far from all of the "present perfected rights" to which the Tribes are legally entitled, all as set forth in the Court's Decree entered March 9, 1964, Article II, D(1)-(5).⁴

B. The Tribes are the real parties in interest in regard to their rights to the use of water in the Lower Colorado River asserting full equitable title in and to those rights.

C. The interest of the United States of America in the Tribes' rights to the use of water in that stream is that of trustee for the Tribes. The trustee is the holder of the naked legal title to those "present perfected rights." As trustee for the Tribes, the United States has the obligation to represent the Tribes before the Court and to preserve, protect and assist the Tribes in the full utilization of those rights to the use of water.

D. As averred in the motion filed by the Tribes, the Secretary of the Interior, as principal agent of the trustee

⁴ Motion, pg. 2, para. III.

United States, is unable to fulfill the obligations of the trustee to the Tribes because that official has responsibilities which are so disparate and conflicting that the Secretary of the Interior, at the time of and throughout the preparation of trial and *Arizona v. California*, and down to the moment of the filing of this Petition, has been unable to properly perform the responsibilities of the trustee for the Tribes in regard to their rights to the use of water. As a consequence of that failure, there has been and will continue to be irreparable damage to the Tribes.⁵

E. The Department of Justice, acting through the Solicitor General, purports to represent the Secretary of the Interior and all of the disparate and conflicting interests of the Department of Interior including the adverse claims of the Tribes with those of the Bureau of Reclamation and its contracting parties, defendants in this cause.⁶ Since the debasement of those rights, all as chronicled in the brief in support of the motion of December 23, 1977, the Justice Department has in the past and is now primarily representing the adverse claims in the Lower Colorado River of the non-Indian projects and uses, all of which are opposed to the claims of the petitioning Tribes.

⁵ *Ibid.*, pp. 2-3 para. IV; see Brief, pp. 1 *et seq.* and citations relative to the all-pervasive conflicts of interest within the Interior and Justice Departments.

⁶ See in that connection the listing of adverse claims in the Petition of Intervention on behalf of the United States where it petitioned the Court to become a party to the case, pp. 9-22. See in particular the claims of the Indians as set forth in the original petition, pp. 22-23, paras. XXV, XXVI, XXVII. See also review of the original petition filed in the case of *Arizona v. California* by the United States in which there was asserted a strong claim on behalf of the Tribes, Petitioners here, and by reason of political pressure that strong statement was withdrawn and a much weaker claim on behalf of the Tribes was set forth, Brief, pp. 5-9.

F. The Final Decree provides in part as follows:

" . . . the States of Arizona, California, and Nevada shall furnish to this Court and to the Secretary of the Interior a list of the present perfected rights. . . .
 "The Secretary of the Interior shall supply similar information, within a similar period of time, with respect to the claims of the United States to present perfected rights within each State. . . ." ⁷

G. Although the Final Decree provided that the list of "present perfected rights" would be submitted to the Court at the end of a two-year period, that list has yet to be formulated and filed with the Court. The protracted delay of thirteen (13) years in resolving the issue of "present perfected rights" of the parties in *Arizona v. California* has been caused very largely, if not entirely, by the conflicts of interest of the Secretary of the Interior who administers the rights of the adverse claims of the Indians and non-Indians.⁸

H. Throughout that protracted period of thirteen (13) years, there have been continuous negotiations among the officials of the Department of Interior, the Department of Justice, the State of Arizona, the California Defendants and the State of Nevada. Those negotiations have been unsuccessful primarily due to the fact that there have been disputes in connection with the nature, right and extent of the claims of the Indians and the parties adverse to the Indians, including but not limited to those non-Indian parties who are likewise represented by the Secretary of the Interior and the Department of Justice.

I. All of the negotiations to resolve the conflicts relative to the "present perfected rights" among the various

⁷ *Arizona v. California, et al.*, 376 U.S. 340, 351-2 (1964), amended 1966, 283 U.S. 268 (1966).

⁸ See Motion, pg. 4, para. VI, Imperative Need To Have Resolved All Issues In *Arizona v. California*.

claimants to waters in the Lower Colorado River among the officials of the Department of Interior and the Department of Justice, the State of Arizona, the California Defendants and the State of Nevada have been conducted without the participation, knowledge, consent or acquiescence of the Tribes or their representatives.⁹

J. As a direct and immediate result of the protracted negotiations among the officials of the Department of Interior and the Department of Justice, the State of Arizona, the California Defendants and the Intervener State of Nevada, without participation of the Tribes, there was filed May 3, 1977, by the aforesaid State of Arizona, *et al.*, a "Joint Motion for a Determination of Present Perfected Rights and the Entry of a Proposed Supplemental Decree; and Memorandum of Proposed Supplemental Decree."

K. Among other things and contrary to known facts, which the Tribes are prepared to contravene if permitted to do so, the Joint Movants allege "present perfected rights" as follows:¹⁰

"B. Water District and Projects Present Perfected Rights

"26)

"The Palo Verde Irrigation District in annual quantities not to exceed (i) 219,780 acre-feet of diversions . . . to supply the consumptive use required for irrigation of 33,604 acres . . . with a priority date of 1877."

The Tribes specifically deny each and every allegation relative to the claimed quantities of water, acres and

⁹ See Appendix A of this Petition. Affidavit of Chairman Llewellyn Barrackman of the Fort Mojave Tribal Council, Fort Mojave Indian Tribe, Chairman of the Confederation of Indian Tribes of the Colorado River.

¹⁰ Joint Motion, pp. 11-12, II California.

priority date, as set forth on behalf of the Palo Verde Irrigation District.

L. Continuing, without basis in fact, the Joint Motion contains this statement:

"The Imperial Irrigation District in annual quantities not to exceed (i) 2,600,000 acre-feet of diversions from the mainstream . . . to supply the consumptive use required for irrigation of 424,145 acres . . . with a priority date of 1901."

The Tribes specifically deny each and every allegation relative to the claimed quantities of water, acres and priority date, as set forth on behalf of the Imperial Irrigation District.

M. The Joint Motion continues:

"The Reservation Division, Yuma Project, California (non-Indian portion) in annual quantities not to exceed (i) 38,270 acre-feet of diversions from the mainstream . . . to supply the consumptive use required for irrigation of 6,294 acres . . . with a priority date of July 8, 1905."

The Tribes specifically deny each and every allegation relative to the claimed quantities of water, acres and priority date, as set forth on behalf of the Yuma Project.

N. On page 6 of the Joint Motion the following is stated:¹¹

"B. Water Projects Present Perfected Rights

"(4) The Valley Division, Yuma Project in annual quantities not to exceed (i) 254,200 acre-feet of diversions from the mainstream . . . to supply the consumptive use required for irrigation of 43,562 acres . . . with a priority date of 1901."

¹¹ Joint Motion, pp. 6 *et seq.*

The Tribes specifically deny each and every allegation relative to the claimed quantities of water, acres and priority date, as set forth on behalf of the Yuma Project.

O. Continuing, the Joint Motion contains this statement:

"(5) The Yuma Auxiliary Project, Unit B in annual quantities not to exceed (i) 6,800 acre-feet of diversions from the mainstream . . . to supply the consumptive use required for irrigation of 1,225 acres . . . with a priority date of July 8, 1905."

The Tribes specifically deny each and every allegation relative to the claimed quantities of water, acres and priority date, as set forth on behalf of the Yuma Auxiliary Project, Unit B.

P. The Joint Motion continues on page 7 as follows:

"(6) The North Gila Valley Unit, Yuma Mesa Division, Gila Project in annual quantities not to exceed (i) 24,500 acre-feet of diversions from the mainstream . . . to supply the consumptive use required for irrigation of 4,030 acres . . . with a priority date of July 8, 1905."

The Tribes specifically deny each and every allegation relative to the claimed quantities of water, acres and priority date, as set forth on behalf of the North Gila Valley Unit, Yuma Mesa Division, Gila Project.

Q. There is alleged in the Joint Motion "Miscellaneous Present Perfected Rights" in the State of Arizona.¹² The Tribes deny each and every allegation contained in the Joint Motion relative to the Miscellaneous Rights set forth by the State of Arizona and, if afforded an opportunity, will prove that they are not correct either as to quantities of water or dates of priority.

¹² Joint Motion, I Arizona, pp. 6-10, C. Miscellaneous Present Perfected Rights.

R. The Joint Motion likewise sets forth "Miscellaneous Present Perfected Rights" in the State of California.¹³ The Tribes deny each and every allegation contained in the Joint Motion relative to the Miscellaneous Rights set forth by the State of California and, if afforded an opportunity, will prove that they are not correct either as to quantities of water or dates of priority.

S. Rather than denying the spurious claims as to "present perfected rights," as set forth in the Joint Motion, the United States in its response ". . . to the Joint Motion for a Determination of Present Perfected Rights and Entry of a Supplemental Decree," said this among other things: ". . . the parties have now reached substantial accord on many points. . . ." including the grossly inflated claimed "present perfected rights" as asserted by the States in their Joint Motion.¹⁴

T. In the "Memorandum for the United States in Opposition" to the Tribes' motion filed December 23, 1977, the United States, relative to the totally unsubstantiated claims of the States of "present perfected rights," all as set forth above, says this:

"The Tribes deny (Mot. 17) the validity of the State parties' claims to present perfected rights. We do not agree with the Tribes' allegations that the dates and amounts are patently false. . . ." ¹⁵

U. Irrespective of the acceptance—or acquiescence—by the United States of the grossly in error claims for "present perfected rights," as set forth by the States in their

¹³ *Ibid.*, II California, pp. 11-18, C. Miscellaneous Present Perfected Rights.

¹⁴ Response of the United States, November 10, 1977, p. 1.

¹⁵ Memorandum for the United States in Opposition, p. 11, para. V, Tribal Objections to Present Perfected Rights Claimed by the State parties.

Joint Motion, the Tribes reiterate, reaffirm and will prove, if permitted to do so, that:

- (1) The "present perfected rights," as contained in the Joint Motion of the States, are unconscionably inflated far beyond the realm of reality.
- (2) The Lower Colorado River has been over-appropriated to the extent that it is now unable to supply claimed rights to the use of water. Those claimed rights, many of which are now exercised, are being utilized in the State of California to supply domestic water for long-established communities comprised of millions of people in the State of California and industrial users, the existence of which, in part at least, are predicated upon the junior claims of the State of California in the Lower Colorado River. It may well be that, when the Tribes commence fully to exercise their "present perfected rights," it will be politically and practicably impossible for them to recover the waters now being diverted and used by the municipal and industrial users who are exercising junior rights.
- (3) One of the gravest threats to the Tribes is the known over-appropriation of the water supply of the Lower Basin of the Colorado River. Irrespective of that over-appropriation, the Secretary of the Interior, in total disregard of the rights of the Tribes, is now building the Central Arizona Federal Reclamation Project with a capacity of 2,170,000 acre-feet of water annually from the Lower Colorado River. If completed, the Central Arizona Federal Reclamation Project's capacity together with present uses will exceed the entire supply of water in the Lower Basin of the Colorado River.¹⁶

¹⁶ See Colorado River Compact 1922, pp. 53 *et seq.* Documents on the Use and Control of the Waters of Interstate and International Streams, Compacts, Treaties and Adjudications, 1968. 90th Con-

IV.

**THE UNITED STATES HAS WILLFULLY FAILED TO
MAINTAIN COMMUNICATIONS WITH THE TRIBES
WHO ARE CLIENTS/BENEFICIARIES**

The United States has participated throughout this litigation on behalf of the five Tribes along the Lower Colorado River. Notwithstanding, the fact that the United States has fiduciary obligations both as counsel for the Tribes and as trustee for the Tribes, it has deliberately failed throughout this litigation to advise the Tribes as to the status of the proceedings or the effect of these proceedings upon the Tribes' "present perfected rights." The failure properly to represent the Tribes is documented in part in the attached affidavit of Llewellyn Barrackman who is the Chairman of the Fort Mojave Tribal Council and the Chairman of the Confederated Indian Tribes of the Colorado River. (See also Appendix A to the Tribes' Motion filed December 23, 1977.)

**INTERIOR'S POLICY TO LIMIT OR PREVENT THE
EXERCISE OF INDIAN "PRESENT PERFECTED
RIGHTS" ON THE LOWER COLORADO RIVER—
THE ESSENCE OF ALL-PERVASIVE CONFLICTS
OF INTEREST**

V.

The long-time practices and procedures of the Interior Department have been to limit, restrict or prevent the exercise of Indian "present perfected rights" on the Lower Colorado River for the benefit of non-Indian projects and uses.

gress, 2d Session, House Document 319. See 43 U.S.C. 1521, *et seq.*, Central Arizona Project.

VI.

Prior to and after the enactment of the Federal Reclamation Act,¹⁷ the Secretary of the Interior has steadfastly prevented the development and exercise of Indian water rights on the Lower Colorado River for the benefit of the competing Defendants in *Arizona v. California*, the Imperial Irrigation District, the Palo Verde Irrigation District and the Yuma and Gila Federal Reclamation Projects.¹⁸

VII.

The non-Indians on the Federal Reclamation Projects on the Lower Colorado River historically have received 160 acres¹⁹ of irrigable land in sharp contrast to the acreage allotted to the Indians. The Quechans of the Fort Yuma Reservation and the Indians on the Colorado River Indian Reservation, under the original acts, received "... five acres of irrigable land."²⁰

VIII.

Because of the conflict of interest between the Tribes' rights and those claimed by the Bureau of Reclamation and its constituents, the violation of Indian rights to the use of water and the preclusion of the exercise of those rights have become a basic policy of the Department of Interior. That policy has been most pronounced where the Indian lands and claims were in direct conflict with the California Defendants, Palo Verde Irrigation District,

¹⁷ 43 U.S.C. 371.

¹⁸ See attached Affidavit of Charles P. Corke, Appendix B.

¹⁹ 43 U.S.C. 431.

²⁰ 33 Stat. 224. Subsequently, those Indians were allotted ten (10) acres of irrigable land.

Imperial Irrigation District and the aforesaid Federal Reclamation Projects, the Yuma and Gila Projects.

IX.

There is attached to this Petition of Intervention by the Tribes an affidavit of an official of the Bureau of Indian Affairs who has for the past 20 years witnessed the prevention of the development of the rights to the use of water of the Tribes in the western United States in general and particularly on the Colorado River. Reference is made in that affidavit to the studied violation by the Interior Department of those rights and to the prevention of development of those rights including but not limited to the refusal to seek funds for the Tribes' irrigation projects. The attempt to "stipulate the present perfected rights" of the States and the California Defendants, while refusing to have determined the "present perfected rights" of the Tribes, is a manifestation of that long-time policy.²¹

²¹ See Appendix B, Affidavit of Charles P. Corke, Acting Chief, Irrigation Section, Office of Trust Responsibilities, Bureau of Indian Affairs, Department of Interior.

**THE UNITED STATES' REFUSAL TO ESTABLISH
BOUNDARIES ON THE INDIAN RESERVATIONS,
A COROLLARY TO INTERIOR POLICY TO
PRECLUDE EXERCISE OF INDIAN
"PRESENT PERFECTED RIGHTS"**

X.

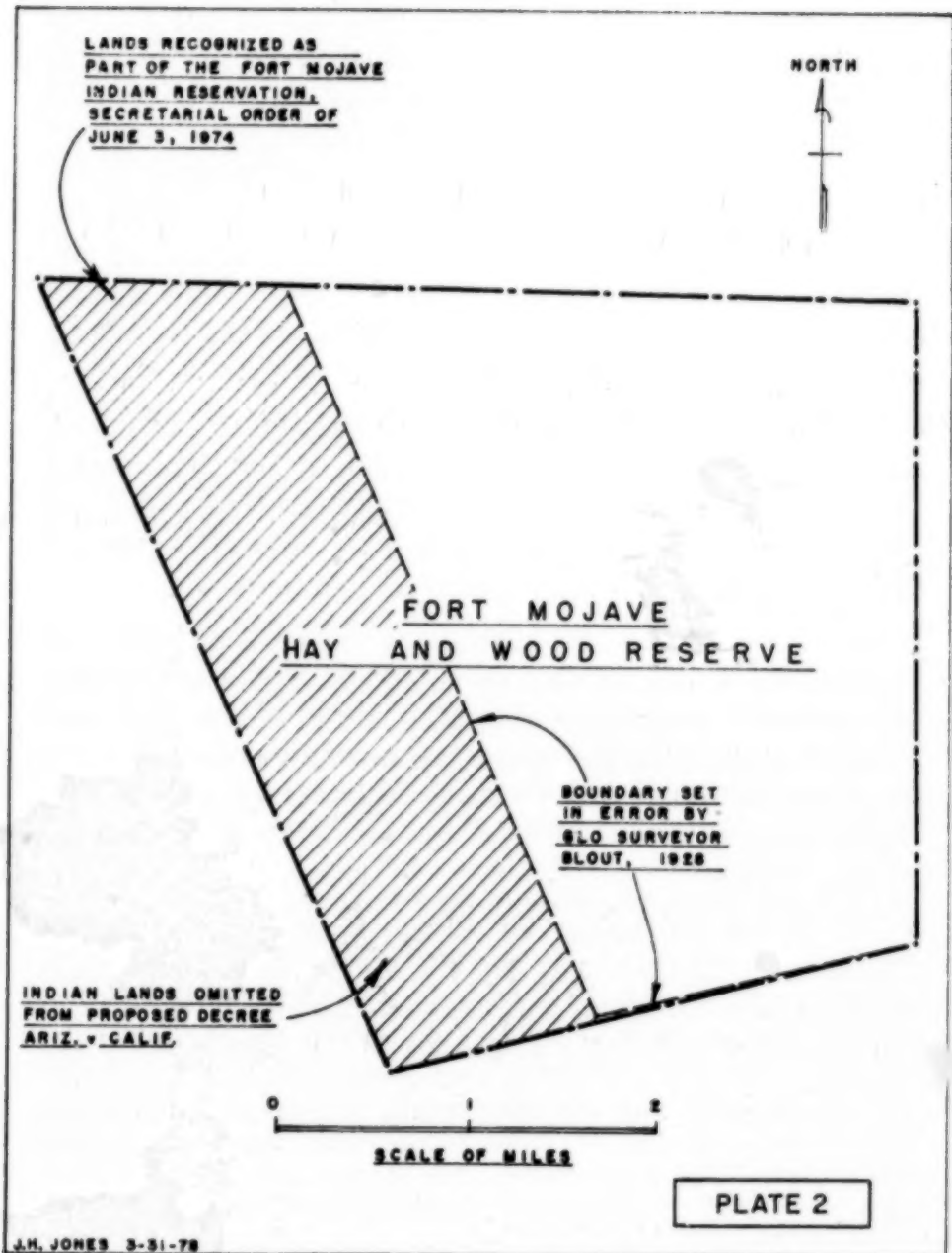
In excess of 100 years, subsequent to the establishment in 1865 of the Colorado River Indian Reservation, the boundaries of those reservations continue to remain undetermined. That fact is a prime example of the Interior Department policy to prevent the exercise of Indian "present perfected rights." That adamant refusal to determine the reservation boundaries has resulted in grave doubts as to the measure, extent and nature of the "present perfected rights" of the Tribes. Refusal to perform a routine task of determining the boundaries further exemplifies the conflicts of interest within the Interior Department as they pertain to the sharp conflict between the Indian and the non-Indian claimants to water from the over-appropriated Colorado River. A graphic illustration of the intentional omission of Tribal lands from the response of the United States to the Joint Motion is depicted on Plate 2, which follows:

A. Fort Mojave Indian Reservation

1. *The Hay and Wood Reserve*

There is incorporated into this paragraph that part of the motion of the petitioning Fort Mojave Indian Tribe pertaining to the Hay and Wood Reserve.²² As averred in the Tribes' motion, the Secretary of the Interior in 1931 approved an official survey which stripped 3500 acres of invaluable land from the Fort Mojave Indian Reservation. On March 15, 1967, the Solicitors Office of the Department of Interior declared a substantial part of those 3500

²² Motion, p. 9, para. XVIII *et seq.*



acres of land to come within the purview of the Swamp and Overflow Act, thus vesting title to them in the State of California. Those proceedings were conducted by the Department of Interior without the knowledge of or participation in the proceedings by the Fort Mojave Tribe. By the most fortuitous sequence of events, the Tribes became aware of the divestiture of their lands and undertook the recovery of them. That recovery was accomplished against the adamant opposition of the Solicitors Office.²³

(a) It is a fact known to the Tribes that there was little or no factual or legal preparation by the Department of Justice in regard to the boundary of the Hay and Wood Reserve, which was brought into issue before the Special Master.²⁴

(b) Investigations undertaken in cooperation with and for and on behalf of the Fort Mojave Tribe established the correct boundary of the 3500 acres of the Hay and Wood Reserve for which there has been presented no claim for "present perfected rights." That investigation and the opinion stemming from it are set forth in the motion of the Tribes.²⁵

(c) In the November 10, 1977 response of the Justice Department to the Joint Motion of the States and California Defendants, no claims were made nor was there any response effectively presented to the assertions of the

²³ See Opinion, Aug. 10, 1971, State of California, Applicant, United States Bureau of Land Management, Respondents; Fort Mojave Indian Tribe, Intervener. See Opinion, Nov. 24, 1972, Decision of Office of Hearings and Appeals, Department of Interior, 1BAL70-150, State of California.

²⁴ See Dec. 5, 1960 Report, Special Master, Arizona v. California, Boundary Dispute—Opinion, pp. 283 *et seq.*; see Court's rejection of Special Master's determination, Arizona v. California, 373 U.S. 546, 601 (1963).

²⁵ See Motion, pg. 10, and Appendix, p. 1B *et seq.*

Joint Movants in regard to the Hay and Wood Reserve of the Fort Mojave Indian Reservation.²⁶ Failure of the Department of Justice to bring to the attention of the Court in the Response of November 10, 1977, the resolution of the boundary dispute for the Hay and Wood Reserve of the Fort Mojave Indian Reservation is representative of the general refusal to properly represent the Indian Tribes in the case of *Arizona v. California*.

(d) Additional lands in the Hay and Wood Reserve: There is attached to this Petition and made a part of it by reference Appendix C setting forth additional lands entitled to "present perfected rights" in the Hay and Wood Reserve for which no claims were asserted by the Department of Justice.

2. *Camp Mojave Reserve in the Fort Mojave Indian Reservation*

There is set forth in Appendix C lands in the Camp Mojave Reserve of the Fort Mojave Indian Reservation for which no "present perfected rights" were claimed by the Justice Department in the case of *Arizona v. California*.

3. *The Intermediate Area of the Fort Mojave Indian Reservation*

There is set forth in Appendix C additional lands in the Intermediate Area of the Fort Mojave Indian Reservation for which claims for "present perfected rights" were not asserted by the Department of Justice in the case of *Arizona v. California*.

4. *The Checkerboard Area of the Fort Mojave Indian Reservation*

There is set forth in Appendix C additional lands in the Checkerboard Area of the Fort Mojave Indian Reser-

²⁶ Motion, December 23, 1977, p. 9 *et seq.* See Joint Motion, Claims, p. 24 *et seq.*

vation for which no claims for "present perfected rights" were made by the Department of Justice in *Arizona v. California*.

Petitioner, the Fort Mojave Tribe, hereby asserts claim for "present perfected rights" for all of the additional lands set forth above and for those lands set forth in Appendix C.

B. Colorado River Indian Reservation

1. *State of California Benson Line Area, Ninth Avenue Cut-Off, Olive Lake Cut-Off*

There is incorporated into this Petition the allegations contained in the Tribes' December 23, 1977 motion in regard to the following in the Colorado River Indian Reservation: (a) The State of California Benson Line Area; (b) the Ninth Avenue Cut-Off; and (c) the Olive Lake Cut-Off.²⁷ In regard to the land referred to in (a), (b) and (c) no claims have been made for "present perfected rights" for the Tribes in *Arizona v. California*. (See also Appendix C.)

2. *Lands South of the Benson Line of the Colorado River Indian Reservation*

There is set forth in Appendix C the additional lands within the Colorado River Indian Reservation for which no "present perfected rights" were claimed by the Department of Justice in *Arizona v. California*.

3. *Lands along the Northern Boundary and Lands South and East of the Colorado River within the Colorado River Indian Reservation*

There is set forth in Appendix C additional lands along the northern boundary and lands south and east of the

²⁷ Motion, pp. 12-13.

Colorado River within the Colorado River Indian Reservation for which no "present perfected rights" were claimed by the Department of Justice in *Arizona v. California*.

4. *Lands in the La Paz Area of the Colorado River Indian Reservation*

There is set forth in Appendix C additional lands in the La Paz area within the Colorado River Indian Reservation for which no "present perfected rights" were claimed by the Department of Justice in *Arizona v. California*.

Petitioner, the Colorado River Indian Tribes, hereby asserts claim for "present perfected rights" for all of the additional lands set forth above and for those lands set forth in Appendix C.

C. Chemehuevi Indian Reservation

1. There is incorporated into this Petition and made a part of it by reference the claims set forth in the December 23, 1977 motion made for and on behalf of the Chemehuevi Indian Tribe.²⁸

2. Additional lands for the Chemehuevi Tribe: There is set forth in Appendix C additional lands within the Chemehuevi Indian Reservation for which no claim for "present perfected rights" was made by the Department of Justice in *Arizona v. California*.

Petitioner, The Chemehuevi Indian Tribe, hereby asserts claim for "present perfected rights" for all of the additional lands set forth above and for those lands set forth in Appendix C.

²⁸ See Motion, p. 14, D.

D. Quechan Tribe of the Fort Yuma Indian Reservation

1. Title to Lands Residing in Quechan Indian Tribe Entitled to "Present Perfected Rights"

There is incorporated into this Petition and made a part of it by reference the claims and allegations respecting the failure of the Secretary and the Solicitor of the Department of Interior to resolve the rights, title and interest of the Quechan Tribe in and to the lands and the "present perfected rights" for use in connection with those lands.²⁹

2. Lands Accreted to the Fort Yuma Indian Reservation

There is set forth in Appendix C of this Petition the claims of the Quechan Tribe to lands accreted to the Fort Yuma Indian Reservation to which no claims were made for "present perfected rights" by the Department of Justice in *Arizona v. California*.

Petitioner, the Quechan Tribe of the Fort Yuma Indian Reservation, hereby asserts claim for "present perfected rights" for all of the additional lands set forth above and for those lands set forth in Appendix C.

XI.

IRRIGABLE LANDS FOR WHICH THE TRIBES ARE ENTITLED TO "PRESENT PERFECTED RIGHTS" ARE ARBITRARILY AND CAPRICIOUSLY ABANDONED IN ARIZONA V. CALIFORNIA

There is specifically incorporated into this Petition and made a part of it by reference the irrigable lands which were arbitrarily and capriciously abandoned by the Department of Interior in the preparation of the case of *Arizona v. California*.

²⁹ *Ibid.*, para XXIV.

Each of the petitioning Tribes, individually and collectively, asserts and claims "present perfected rights" for the irrigable lands tabulated in the motion.³⁰

XII.

TRIBES REAFFIRM CLAIMS TO DECREED RIGHTS

Each of the Tribes, individually and collectively, asserts all of their rights, title and interest in and to the "present perfected rights," all as ordered, adjudged and decreed to them by the Final Decree, Article II D (1)-(5).

XIII.

The failure of the Department of the Interior and the Department of Justice to properly claim for the Tribes individually and collectively "present perfected rights," all as set forth above, *supra*, p. 12, *et seq.*, should in no way prejudice or adversely affect the "present perfected rights" already adjudicated to the Tribes in the Final Decree.

XIV.

TRIBES ARE NOW AND HAVE BEEN DISCRIMINATED AGAINST BY REFUSAL TO PROVIDE FUNDS TO PROTECT THEIR INTERESTS IN ARIZONA V. CALIFORNIA

There is set forth in detail in both the motion and brief filed by the Tribes December 23, 1977, the history of conflicts of interest within the Department of Interior and the Department of Justice.³¹ Reviewed there is the fact that officials of the Departments of Interior and Justice readily admitted the conflicts of interest within their

³⁰ See Motion, pp. 15 *et seq.*; see p. 16, para. XXIX. See also Appendix C of this Petition.

³¹ See Motion, p. 3, para. IV, *et seq.* See Brief, pp. 5 *et seq.*

Departments as they relate to the claims of the Indians and the adverse claims of the non-Indian properties and water uses represented by both Departments.³²

XV.

Judicial cognizance³³ has been taken of the need to have special counsel representing the Tribes where, as here, there are the conflicts of interest within the Interior and Justice Departments between Indian and non-Indian claimants over rights to the use of water which are before the Court for adjudication.

XVI.

In the "United States Department of the Interior Budget Justifications, F.Y. 1979, Bureau of Indian Affairs,"³⁴ Congress is requested "To provide sufficient funds for rights issues resolution, litigation, and attorneys fees."³⁵ Moreover, the General Accounting Office, by a recent opinion, has specifically recognized the propriety of using appropriated funds to pay legal fees where the conflicts of interest are of such character that it is impossible to utilize the Department of Justice to represent the Indian interests in water litigation.³⁶

XVII.

Irrespective of the administrative, judicial, and legislative recognition of the need for employing independent counsel to represent the petitioning Tribes, due to the

³² See Brief, pp. 7-9.

³³ *State of Mexico v. Aamodt*, 537 F.2d 1102 (CA 10, 1977).

³⁴ Appendix D, p. 5.

³⁵ *Ibid.*, BIA-62 of original document.

³⁶ Decision dated May 30, 1975, Expenditures for the legal expenses of Indian tribes, The Comptroller General of the United States, Washington, D.C., Appendix E.

conflicts of interest in cases such as *Arizona v. California*, the Department of the Interior and the Department of Justice adamantly refused to provide special counsel for the Tribes. Additionally, funds will not be provided by those Departments for Petitioner Fort Mojave and other Tribes which have their own counsel but insufficient funds to pay for their services. That type of discrimination against the Tribes is a further manifestation of the intentional violation of the trust obligation of the United States to protect the "present perfected rights" of the Tribes. Those Departments have, moreover, refused to authorize the utilization of counsel within the Department of the Interior, all as authorized by the Congress.³⁷ Similarly, the Department of the Interior has refused to provide funds with which to prepare this Petition or any of the costs in connection with it.

XVIII.

PATENT AMBIGUITIES IN "PROPOSED SUPPLEMENTAL DECREE," IF ADOPTED, WILL ACCENTUATE NOT AMELIORATE ON-GOING CONFLICTS ³⁸

There is specifically incorporated into this paragraph all parts of the Tribes' motion pertaining to the "patent ambiguities" in the "Proposed Supplemental Decree."³⁹ If adopted, the patent ambiguities will compound the present, most serious controversies as to the meaning of the Final Decree, all as averred in the Tribes' motion.

³⁷ Motion, p. 2, para. IV.

³⁸ Motion, p. 6.

³⁹ Motion, pp. 6-9, Para. XI *et seq.*

XIX.

The Tribes' interests will suffer irreparable damage unless they are made full participating parties to this suit. The errors, patent ambiguities, distortions and the failure to recognize all of the "present perfected rights" of the Tribes, as the Joint Motion and the Response thereto now stand, will only contribute to the historic conflicts between the Indians and the non-Indians to Colorado River water, and, instead of resolving disputes and controversy, will only serve to compound the problems.

XX.

**INTERVENTION BY THE TRIBES WILL EXPEDITE
NOT IMPEDE THE ULTIMATE CONCLUSION OF
ARIZONA V. CALIFORNIA**

Efforts to piecemeal the resolution of the complex and contentious issues of "present perfected rights" between the conflicting Indian and non-Indian rights, as proposed by the States, Joint Movants, can only result in protracted and, indeed, further futile litigation. A vast array of problems as to claims of the non-Indian either represented by the Department of Justice or operating under contractual assignments with the Secretary of the Interior remains to be resolved. Those problems involving the extent, measure and nature of the "present perfected rights" of all parties can best be resolved by the elimination of conflicting interests which pervade all aspects of *Arizona v. California* in its present posture.

XXI.

The Tribes' interests in the "present perfected rights" to Colorado River water are markedly divergent from the rights asserted by the Department of the Interior and the Department of Justice in that these agencies of the United States need for themselves great quantities of

water and, acting in concert with the various State parties, have embarked upon a course of conduct designed to compromise the lawful claims of the Tribes. The United States is not, and has not been, effective in asserting Tribal rights, nor has the United States attempted diligently to fulfill its trust obligations in its opposition to the Joint Motion.

XXII.

Without Tribal intervention, the "present perfected rights" of the Tribes will be irreparably damaged and the final determination, as proposed, of the "present perfected rights" of the Arizona and California Defendants would be inconsistent with equity and good conscience.

XXIII.

Alternatively and supplementally, the Tribes meet the requirements for intervention as a matter of right or for permissive intervention as prescribed in the Federal Rules of Civil Procedure, Rules 24(a)(2) and 24(b)(2). As owners of full equitable title in and to "present perfected rights" in the Colorado River, the Tribes' interests will necessarily be irreparably damaged by the attempted determinations as set forth in the proposed Supplemental Decree.

XXIV.

Tribal intervention will in no way unduly prejudice any of the parties since, through this litigation, the Tribes have been purportedly represented by the Solicitor General, and the Tribes have been the real parties in interest. The magnitude of the rights being litigated and the errors, ambiguities and defects of the proposed Supplemental Decree which are not being corrected by the Solicitor General require the substitution of new counsel for the Tribes who will provide effective representation and whose sole responsibility will be to the Tribes.

XXV.

**ALLEGED SUBORDINATION—A FRAUD AND
A SUBTERFUGE**

There is no merit to the alleged subordination set forth in the Joint Motion and agreed to by the United States in the Response. That alleged agreement purports to subordinate the conflicting "present perfected rights" of the non-Indian projects and uses to the largely undetermined "present perfected rights" of the Tribes. As emphasized in the Tribes' motion, the patent ambiguities on the face of the subordination render it meaningless. As proposed, that subordination, if adopted, would create conflicts—not resolve them.⁴⁰ To agree to an alleged subordination in return for the acceptance of the gravely misstated and grossly inflated claimed "present perfected rights" of the Imperial Irrigation District and others would, without a determination of the "present perfected rights" of the Tribes, only bring disaster to the Tribes. Any subordination that will have merit can only be achieved through the Tribes acting through their own counsel who will be free of conflicts of interest. Hence, the Tribes reject any suggested subordination of the character apparently agreed to by the United States.

WHEREFORE, the Fort Mojave Tribe, the Quechan Tribe of the Fort Yuma Indian Reservation, the Chemehuevi Indian Tribe, the Colorado River Indian Tribes and the Confederation of Indian Tribes of the Colorado River; and the National Congress of American Indians, acting individually and collectively, respectively petition the Court as follows:

When, all in accordance with the letter dated February 23, 1978, from the Clerk of the Court, the United States has filed its response to the Tribes'

⁴⁰ See Motion, pp. 6 *et seq.*

motion, brief and this petition of intervention and when the State parties have filed a response to this petition of the Tribes, the Court will enter the following order:

1. To allow the Tribes to intervene in *Arizona v. California* and to have their own counsel to represent them independent from the Solicitor General of the United States in all future matters pertaining to that case;
2. To refrain from granting the Joint Motion for a Determination of "Present Perfected Rights" and from granting any relief prayed for in that Joint Motion;
3. To require all parties to meet at a time certain with the objective of resolving, if possible, the conflicts among them as to the measure and extent of their respective "present perfected rights" and in regard to any issues which may be unresolved to stipulate as to the nature, character and extent of those issues and to file that stipulation with the Clerk of the Court within a specified time. If full agreement as to the unresolved issues cannot be achieved among the parties, the parties will be authorized to file separate statements on their own behalf;
4. To enter an appropriate order for further proceedings as it may deem necessary, under the

circumstances, based upon the stipulations as to resolved and unresolved issues among the parties.

Respectfully submitted,

RAYMOND C. SIMPSON, Attorney for
Petitioners, the Fort Mojave Tribe,
the Quechan Tribe of the Fort Yuma
Indian Reservation, the Chemehuevi
Indian Tribe, the Colorado River
Indian Tribes and the Confederation
of Indian Tribes of the Colorado
River; and the National Congress of
American Indians as Amicus Curiae

2032 Via Visalia
Palo Verdes Estates, CA 90274

DATED: April 7, 1978

APPENDIX A

**Affidavit of Chairman Llewellyn Barrackman of the Fort
Mojave Tribal Council, Fort Mojave Indian Tribe, Chairman
of the Confederation of Indian Tribes of the Colorado River**



AFFIDAVIT

Affiant does hereby state that: he is a citizen of the United States, over the age of twenty-one, and an American Indian duly enrolled as a member of the Fort Mojave Indian Tribe. His reservation is geographically surrounded by the States of Arizona, California and Nevada—with the Colorado River running through the reservation.

At the present time he is the elected Chairman of the Fort Mojave Tribal Council and the elected Chairman of the Confederated Tribes of the Lower Colorado River, whose membership includes the Cocopah, Quechan, Colorado River, Chemehuevi and Fort Mojave Indian Tribes.

I have repeatedly requested that the United States consult with our tribes regarding our water rights under *Arizona vs. California*, but my requests have been to no avail. Instead, the United States merely scheduled some meetings where they told us that our input was not desired since a "deal" had already been made with the States and the Irrigation Districts. This started in 1971, when the leaders of our respective tribes were asked to come to Washington, D.C. to discuss a Stipulation that was being proposed. Representatives of the Department of Justice and the Department of Interior at that time told us that the Supreme Court wanted to finalize the present perfected rights under Article VI of the decree within two years after it had issued, but that necessary studies to marshal the facts had not been conducted so that the proposed Stipulation seemed like the easiest answer.

In response, the Indian leaders objected to the Stipulation and requested that a diligent effort be made without further delay to obtain the facts so that the truth could be presented to the Supreme Court.

Other meetings designed to pressure the Indians were thereafter scheduled, but these meetings can in no way be

described as "consultation". They involved a one-way street with dictation to the Indians. In other words, the Indian leaders believed that "consultation" was a two-way street, where the Indians would be afforded the opportunity of telling their side. These meetings amounted to little more than a farce—a charade that would permit the United States, for the record, to say that they had actually met with the Indians, but which clearly concealed the fact that the United States as the legal representative of the Indians had not really "consulted" with the "client".

In early 1972, the Indians requested that the Secretary of the Interior make funds available to employ experts in the area of soil classification so that their irrigable acres under the *Winters* Doctrine could be correctly determined. Again the Indians were urged to accept the proposed Stipulation—the "deal" that their trustee had made with the States and the Irrigation Districts! Our Indian leaders in turn went to see the Chairmen of the Indian-Subcommittees of both the Senate and the House. As a result, funds were then made available in 1974 to employ an engineering firm to do the soil classification work. In fact, the Indians were next told to attend a meeting in Yuma, Arizona to "consult" with the Bureau of Indian Affairs regarding the selection of the best qualified firm to do the work. When they arrived the Indians were given the names of five firms that had already been evaluated by the Indian Bureau who stated that "all five" were acceptable. In turn, the Indians rejected one firm with specific reasons, and immediately told the Indian Bureau personnel the name of their first choice. The representatives of the Indian Bureau then thanked the Indians, concluded the meeting, went back to Phoenix, and two days later employed the one firm the Indians had rejected.

In 1975 the Secretary of the Interior, after numerous requests by the Indians, made funds available to hire experts to examine the claims by the three major non-Indian Irrigation Districts on projects contained in the

A-3

proposed Stipulation of Present Perfected Rights, considering both the dates and acreages claimed.

On March 31, 1975, a consulting firm was employed. The consulting firm soon found that the priority dates claimed and acreages claimed were wrong, and were based upon "a deal" made by the States and not upon facts. When the Area Office found out that the consultant was discovering that the proposed Stipulation of Present Perfected Rights was false, they began to delay payment to the consultant, some payments were delayed for nearly one and a half years, and others still haven't been paid.

The Area Office not only did not cooperate with the consultant, but harassed him; refused to extend the time limitation provided in the contract, even though the consultant had not spent all of the monies covered by the contract; refused to enlarge the contract even though the Washington office offered the money and urged enlargement of the contract; and the Area Office attempted to confiscate the work. All of this was done to prevent the Indian effort to have the truth presented to the Supreme Court.

Again, in 1975 the Indian leaders were again called to a meeting by the Bureau of Indian Affairs to consider the soil classification work which had been completed, and to give their approval. The preliminary results looked rather good to our Indian leaders, but we could not give our approval due to the fact that certain specific areas of land had not been included, and we were unwilling to endorse such deception. At this time we were warned that if we kept on insisting upon the truth being presented to the Supreme Court that we would really be in trouble. Although we had no wish to be unreasonable we firmly felt that anything short of a truthful presentation would be both intolerable and unconscionable. Hence, all of the Indian leaders agreed to stand firm.

In the wake of this warning we learned that the Department of Justice, the Department of the Interior, the

States, and the Irrigation Districts were going to have a "big" meeting in Washington, D.C. to resolve the Indian opposition to the proposed Stipulation. On behalf of the Indian leaders I requested that we be included. My request was denied. I next requested that the attorney representing our Confederated Tribes be allowed to be present. By the time that the big meeting took place this request was conditionally granted, the condition being that our attorney was not to say anything at the meeting unless everyone else had had their say and some meeting time was still left. This "big" meeting took place in May of 1976, and it was chaired by the Solicitor for the Department of the Interior. The theme of the meeting was evidenced by the repeated assertion that there was an abundance of water in the Colorado River so that the Indians should not worry about the fact that the proposed Stipulation gave them a priority junior to our opponents.

When all others had been given a chance to say whatever they wanted, the Solicitor then told our attorney that he could comment. His comment was brief. In substance he said that the Indians could not accept the Stipulation because this would require that they became an accessory to the perpetration of a fraud upon the Supreme Court. He then noted that the priority dates given to the Irrigation Districts are false, and that any honest investigation of the facts would graphically show that the stipulated "facts" had no relationship to reality. He further emphasized that this was critical to the Indians due to the fact that the Colorado River is already bankrupt. Further, he then challenged those present to prove their premise that there was no reason to worry about a shortage of water by agreeing to subordinate their clients position to that of the Indians. His challenge was rejected unless the Indians would agree to give up any claim to water for their disputed lands which might be added to their reservation in the future.

After this "big" meeting the Indian leaders next persuaded the Bureau of Indian Affairs to start an investigation of the facts related to the claimed priorities of their opponents. When this investigation uncovered the facts that proved the flagrant falsifications set forth in the proposed Stipulation, word came from high authority that the funding for the investigation had been ended.

In May of 1977, the States gave up on their plan to sell the proposed Stipulation and filed a joint motion to have the Supreme Court enter a decree which in substance was the same as the Stipulation. In response, the United States has continued its refusal to aggressively advocate our Indian rights. In fact, when I requested additional time to provide Indian input for the response I was once again told that this could not be done. Hence, since we really lacked true legal representation for our Indians, I called a meeting of our Indian leaders and we agreed to ask the Supreme Court to take cognizance of the inherent conflict of interest which besets the United States, and to allow us to have our position presented by independent legal counsel of our own choice.

Still a further illustration pertaining to my tribe alone took place in March 1977, when the Area Office made a contract with a consulting engineer to study the river movements of the Colorado River through our Reservation, in order to determine the ownership status of our lands in connection with *Arizona v. California*. This contract was made without telling us it was going to be made; without asking us if we approved of it, without telling us who the contractor was, and without furnishing us a copy of the report written by the contractor. The contractor never visited the Fort Mojave Indian Reservation during the course of the preparation of his report, nor did he ever ask any of our Tribal members anything about the problem.

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I protested this action to the Bureau of Indian Affairs but nothing was done about it.

DATED this 1st day of April, 1978.

/s/ Llewellyn Barrackman
LLEWELLYN BARRACKMAN

STATE OF ARIZONA)
) SS
COUNTY OF MARICOPA)

Subscribed and sworn to before me, by the above name
Llewellyn Barrackman, this 1st day of April, 1978.

/s/ Marjorie Cessna
Notary Public

My Commission Expires Jan. 24, 1982.

APPENDIX B

Affidavit of Charles P. Corke, Acting Chief, Irrigation Section, Office of Trust Responsibilities, Bureau of Indian Affairs, Department of the Interior



AFFIDAVIT OF CHARLES P. CORKE,
ACTING CHIEF, IRRIGATION SECTION,
OFFICE OF TRUST RESPONSIBILITIES,
BUREAU OF INDIAN AFFAIRS,
DEPARTMENT OF THE INTERIOR

I, Charles P. Corke, being first duly sworn upon oath, depose and say that:

1. I am and have been for twenty-two (22) years an agricultural engineer directly and immediately involved in all phases of agriculture and irrigation development of the lands within the Indian reservations bordering upon or being traversed by the Lower Colorado River. Those reservations are as follows: (a) Fort Mojave Indian Reservation, (b) Chemehuevi Indian Reservation, (c) Fort Yuma Indian Reservation occupied by the Quechan Tribe, (d) Colorado River Indian Reservation.

2. From the initiation of the case of *Arizona v. California*, I have been directly and immediately involved in all phases and aspects of the claims of the Tribes occupying the Indian reservations referred to above.

3. I was assigned to and had the responsibility of preparing or assisting in preparing the technical data and exhibits required to prove the irrigable acreage within each of the aforesaid Indian reservations, the water requirements from the Lower Colorado River necessary to be applied to those irrigable acres to make them productive and other pertinent data required to prove factually the measure of the "present perfected rights" to which the Tribes are legally entitled for their irrigable lands on those reservations.

4. Subsequent to that time, I was appointed Deputy Assistant Commissioner of the Division of Economic Development of the Bureau of Indian Affairs, Department of the Interior and, in that capacity, I had the responsi-

bility of preparing or assisting in preparing the budgets to obtain funds for the development of the irrigable lands within those reservations. In my present position as Acting Chief of the Irrigation Section, Office of Trust Responsibilities, Bureau of Indian Affairs, Department of the Interior, I make this sworn statement relative to each of the reservations (with the exception of the Colorado River Indian Reservation which is discussed later) and of the Department of Interior's failure:

- a. To assist the Tribes occupying those reservations to develop the irrigable lands requiring water from the Colorado River to make those irrigable lands productive;
- b. To prepare plans for the development of irrigation projects essential to the irrigation of those lands;
- c. To request funds from Congress or otherwise to budget funds to build irrigation projects to irrigate the lands in each of the reservations;
- d. To impede, restrict or restrain the individual efforts of the Tribes to develop their own irrigable lands and thus to exercise their "present perfected rights."

5. I personally know of the long-term practice by the Department of the Interior to prevent, refrain or defer the determination of boundary disputes which exist on each of those reservations despite the efforts of the Tribes themselves to conduct proper factual and legal investigations for the purpose of establishing exterior boundaries of the lands and thereby defining with certainty the irrigable lands within them and title to "present perfected rights."

FORT MOJAVE INDIAN RESERVATION

1. The Department of the Interior has refused and continues to refuse to prepare developmental plans for the

irrigation of the lands within the Fort Mojave Indian Reservation either before or after the entry of the Final Decree in *Arizona v. California* in 1964, although the irrigable character of those lands had been known for at least thirty (30) years antecedent to the initiation of the case.

2. I personally know that the Fort Mojave Indian Tribe, on its own initiative and at great cost to itself, proceeded to obtain funds in the last three years to make extensive development of irrigable acreage and, in so doing, has now an imperative need to have determined with specificity the "present perfected rights."

3. In keeping with the policy of refusing to develop plans for the irrigation of the lands of the Fort Mojave Indian Reservation, the Department of the Interior has at all times refused and continues to refuse to seek funds from Congress for the development of the lands of the Fort Mojave Indian Reservation resulting in the Tribe being forced to obtain its own financing and to enter into long-term leases which do not provide the rental returns they would if they had developmental assistance from the Department of the Interior.

4. Because of the policy of the Department of the Interior to impede, if not prevent, the irrigation of lands within the Fort Mojave Indian Reservation, the Department of the Interior failed and continues to fail to provide electric power for the Fort Mojave Indian Tribe which, under law and regulation, is entitled to preferential status like other similarly situated Tribes, municipalities and other users. As a result, the Fort Mojave Indian Tribe is now confronted with a most serious economic problem because of the fact that the costs of power have trebled to the Fort Mojave Indian Tribe with the consequence that their economic development is threatened.

5. I personally have observed and have personal knowledge of the fact that the Department of the Interior has

refused to take the requisite steps to determine the boundaries of the Fort Mojave Indian Reservation and such determinations as have been made have been undertaken by the Fort Mojave Tribe itself. I further know that there are numerous other boundary disputes involving the apportionment of accreted lands that have not been resolved although they can be readily determined by the most simple and routine activities of apportioning accreted lands that have attached to the reservation properties. Moreover, the policy of narrowing and changing the channel of the Colorado River through the Fort Mojave Indian Reservation has taken place creating further irrigable lands but the policy of the Department of Interior has been to restrict the irrigation of those lands although, throughout the entire reach of the Colorado River from Davis Dam to the Mexican border, comparable lands are now being irrigated by non-Indian water users.

6. I personally know that the Department of the Interior and the Department of Justice, acting in concert, deliberately, intentionally, arbitrarily and capriciously failed to assert claims for irrigable lands although the lands were known to be irrigable in character. At the time that evidence was being introduced into the record at the trial of the facts in *Arizona v. California*, I was present in the courtroom when those lands were arbitrarily and capriciously abandoned in the trial of that case.

CHEMEHUEVI INDIAN RESERVATION

1. I am personally acquainted and have personal knowledge that the Department of Interior has for nearly three-quarters of a century intentionally discriminated against the development of the irrigable lands within the Chemehuevi Indian Reservation and refrained totally from taking any action for the economic development of those lands, although the surrounding area has continued to

be developed and to become economically viable. To date, although the large areas of land within the Chemehuevi Indian Reservation are known to be irrigable in character, there has been no action taken by the Department of Interior to subject those lands to irrigation to the irreparable damage of the Chemehuevi Indian Tribe.

2. I personally know that the development of Parker Dam and Reservoir should have been of great economic benefit to the Chemehuevi Indian Tribe. However, until most recently, the Tribe was denied access to the Parker Dam and Reservoir and now is permitted only limited access to the lake created by Parker Dam.

3. I personally witnessed and have personal knowledge that in the case of *Arizona v. California* large areas of known irrigable lands within the Chemehuevi Indian Reservation were arbitrarily and capriciously abandoned by the Department of Interior acting in concert with the Department of Justice with the attendant refusal to offer evidence in regard to the irrigable character of a large segment of the reservation.

4. As occurred in regard to the Fort Mojave Indian Reservation, the Chemehuevi Indian Tribe is entitled to an allocation of electric power in a preferential status at rates which would greatly assist economic development. Failure of the Department of the Interior and the Department of Justice in *Arizona v. California* to make appropriate claims for irrigable lands and the steadfast failure to develop the Chemehuevi Indian Reservation have in the past caused and will continue to cause irreparable damage to the Chemehuevi Indian Tribe.

FORT YUMA INDIAN RESERVATION OCCUPIED BY THE QUECHAN TRIBE

1. I am personally acquainted with and I am fully informed in regard to the status of the title of the Fort

Yuma Indian Reservation occupied by the Quechan Indian Tribe. The data obtained and the information secured through investigations directed largely by me in connection with the issue of the title disclose the failure, over the last three-quarters of a century, to determine the status of the title of the Quechan Tribe to its Fort Yuma Indian Reservation.

2. I personally know that in the development of the All-American Canal to irrigate the Imperial Irrigation District, one of the principal defendants in the case of *Arizona v. California*, the Department of the Interior revived a long abandoned and alleged agreement that purported to cede to the United States lands of the Fort Yuma Indian Reservation. By that method, the All-American Canal was constructed across the Fort Yuma Indian Reservation with the consequence that the Quechan have been and are now denied title to their lands and to the substantial areas of "present perfected rights" which were arbitrarily and capriciously abandoned by the Department of the Interior and the Department of Justice in offering evidence in the case of *Arizona v. California*.

3. The thorough investigation that was made by the Department of Interior, largely under my direction, as to the title of the Quechan Tribe revealed that the Tribe had never relinquished or ceded to the United States the title to those properties, all as confirmed by a preliminary opinion of the Solicitor of the Department of the Interior. That opinion was then withdrawn following vigorous political attacks upon the Department of the Interior.

4. On May 24, 1977, to my personal knowledge, the present Solicitor of the Department of Interior declared that he would investigate the title of the Quechan Tribe and advise them relative to its status. His promise was predicated upon the filing of the Joint Motion for a determination of "present perfected rights" and entry of a supplemental decree by the States of Arizona, California

and Nevada and the other named defendants on May 3, 1977. Failure to make that determination as to title is now and has at all times resulted in irreparable damage to the Quechan Tribe of the Fort Yuma Indian Reservation.

5. I was personally aware of and witnessed the Department of the Interior and the Department of Justice, acting in concert in the case of *Arizona v. California*, refuse to claim "present perfected rights" for nearly 5000 acres of accreted lands on the Fort Yuma Indian Reservation which are invaluable and, indeed, substantial portions of which are now being irrigated although no claim was made for "present perfected rights" on behalf of the Quechan Tribe.

6. Unless and until the title dispute on the Quechan Reservation, which has been so long intentionally deferred for the betterment of the non-Indian claimants to water from the Lower Colorado River is settled, there will be continued conflict among the claimants to water in the Lower Colorado River.

COLORADO RIVER INDIAN RESERVATION

1. I have personally investigated and know that 100 years ago, the United States of America initiated the first congressionally-authorized and financed irrigation project on the Colorado River Indian Reservation. Although repeated efforts have been made by interested parties to secure the completion of that project, it remains over 25 per cent incomplete at this time. That failure to complete the irrigation project on the Colorado River Indian Reservation is the direct result of the long-established policy, sworn to above, of the Department of Interior to preclude or delay the full development of irrigable acreage on the Indian reservations along the Lower Colorado River.

2. For many years, the Department of Interior refused, and today continues to refuse to seek and provide funds to expedite construction work to apply available Colorado River water to some of the finest lands in the world, lands which can be readily irrigated if the irrigation project now in existence is completed in a manner that would include the lands originally intended to be irrigated.

3. Failure of the Department of Interior finally to establish boundaries along large segments of the Colorado River Indian Reservation has resulted in an inability to definitely determine the extent of the "present perfected rights" to which the Colorado River Indian Tribes are entitled.

4. I personally observed and know that in the case of *Arizona v. California*, the Department of the Interior and the Department of Justice, acting in concert, deliberately, arbitrarily and capriciously abandoned lands irrigable in character rather than assert them for and on behalf of the Colorado River Indian Tribes.

5. I personally undertook an investigation of the lands arbitrarily and capriciously abandoned on the Colorado River Indian Reservation, along with the other reservations to which reference has been made, and have determined that the Colorado River Indian Tribes have suffered irreparable and continuing damage due to the failure of the Department of the Interior and the Department of Justice to properly assert claims for water for that reservation.

Finally, under oath, I depose and say that the large developments of the non-Indian projects, with which I am personally familiar and have personally investigated, together with the proposed final determination of exorbitant "present perfected rights" for those non-Indian projects, defendants in the case of *Arizona v. California*, must necessarily cause irreparable damage to all of the Tribes

occupying reservations along the Colorado River. Once "present perfected rights" have been determined by several of the parties while other parties remain in doubt as to the extent of their rights, an unfair distribution of the grievously short water supply results; as a consequence, non-Indian economies will be developed utilizing waters to which the Indians are legally entitled, to the irreparable and continuing irreparable damage to the Indian Tribes.

/s/ Charles P. Corke
CHARLES P. CORKE

SUBSCRIBED and sworn before me this 4th day of April 1978.

/s/ Mario S. Romero
Notary Public

My Commission expires: 6/30/78.

APPENDIX C

**Irrigable Acreage Contained Within Reservation Boundaries
Not Presented to the United States Supreme Court by the
United States in *Arizona v. California***

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IRRIGABLE ACREAGE CONTAINED WITHIN RESERVATION BOUNDARIES NOT PRESENTED TO THE UNITED STATES SUPREME COURT BY THE UNITED STATES IN ARIZONA vs. CALIFORNIA

RESERVATION	Acres	Acre-Feet Per Acre	Acre Feet
FORT MOJAVE			
Hay and Wood Reserve			
West of 1931 Survey	3,500 —	6.46	22,600
Additional Lands	1,200	6.46	7,800
Camp Mojave Reserve	3,000	6.46	19,400
Intermediate Area	1,200	6.46	7,800
Checker Board Area	3,900	6.46	25,200
	<hr/>	<hr/>	<hr/>
Subtotal	12,800		82,800
COLORADO RIVER INDIAN RESERVATION			
Benson Line Area	4,000	6.67	26,700
Ninth Avenue Cut-Off	200	6.67	1,300
Olive Lake Cut-Off	2,000	6.67	13,300
South of the Benson Line	2,500	6.67	16,700
Along Northern Boundary	5,000	6.67	33,400
La Paz Area	3,000	6.67	20,000
Scuth and East of River (Other)	41,600	6.67	277,500
	<hr/>	<hr/>	<hr/>
Subtotal	58,300		388,900
CHEMEHUEVI INDIAN RESERVATION	2,500	5.97	14,900
	<hr/>	<hr/>	<hr/>
Subtotal	2,500		14,900
QUECHAN TRIBE			
Additional Lands	13,000	6.67	86,700
Accretion Lands	4,800	6.67	32,000
	<hr/>	<hr/>	<hr/>
Subtotal	17,800		118,700
GRAND TOTAL	91,400		605,300

FOOTNOTE: These figures are the most exact that are available to the petitioning tribes at this time. The figures which have heretofore been presented to this Honorable Court are grossly inadequate due to the failure of the United States, as Trustee, to expeditiously resolve the boundary disputes and to make the necessary soil surveys and land classifications. See section entitled, "Refusal to Establish Boundaries On the Indian Reservations, a Corollary to Interior's Policy to Preclude Exercise of Indian 'Present Perfected Rights.'" There is possible overlapping which should be resolved by an Order from this Court.

APPENDIX D

United States Department of the Interior Budget Justifications, F.Y. 1979, Bureau of Indian Affairs

D-1

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUDGET JUSTIFICATIONS, F. Y. 1979

[SEAL]

BUREAU OF INDIAN AFFAIRS

**DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS**

**Budget Estimates, Fiscal Year 1979
Congressional Submission**

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Rights Protection:

To meet all challenges of tribal rights and interests protected by treaty, statute or executive order, and initiate whatever action that might be necessary to clarify, to make more firm, the nature of a protected right to ensure the continued viability of that right; to establish financial ability to become involved in those issues, regardless of how many, properly identified as rights protection issues; to fund all those activities required to fulfill our obligations to the tribes and mandated by our trust responsibility; to resolve all unresolved rights issues in the shortest possible time; to accomplish all water inventories still pending. To bring potentially contesting parties together on a broad scale to consider Indian rights issues in a national setting, and to seek and explore areas of common interests and goals. *To provide sufficient funds for rights issues resolution, litigation, and attorneys fees.*

*Base Program**Environmental Quality:*

The National Environmental Policy Act of 1969, and various regulations, require the preparation and submission of environmental impact statements when a proposed action or activity is determined to be a major federal action having significant effect on the quality of the human environment. In response to that direction, the Bureau conducts the following activities:

Proposed actions are examined to identify those potentially within the purview of NEPA.

Upon investigations, an environmental assessment is prepared and a determination is made as to each action's environmental significance. When actions are determined to be significant, an environmental impact statement is prepared and processed.

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Statements of other Federal agencies are reviewed, tribal consultation obtained as necessary, and comments provided.

As trust agent for Indian rights and interests, the Bureau coordinates with tribal organizations involved and with interrelated agencies, all actions affecting Indian interests.

The following workload factors are indicated in the environmental program:

	<u>1976</u>	<u>TQ</u>	<u>1977</u>	<u>1978</u>	<u>1979</u>
Environmental examinations	38,472	12,000	50,000	48,000	48,000
Environmental assessments	845	175	700	720	700
Environmental impact statements	1	1	6	8	8
Environmental consultations	1,308	400	1,500	1,500	1,500
Environmental reviews	458	110	450	450	430

Rights Protection:

The rights protection activity provides the Bureau of Indian Affairs with the problem-solving staff and technical support services required in the administration of the multi-billion dollar estate which the United States administers in behalf of the nation's Indian tribes. This includes the support necessary to meet all challenges to tribal rights and interests that are protected by treaty, statute, or executive order, as well as the initiation of those actions required of a prudent trustee to clarify the nature of and to ensure the continued viability of those rights. This activity funds those studies and actions

needed to preserve and protect Indian water rights, including water inventories, because, while Indian water rights are vested and protected by the 5th Amendment to the Constitution, these rights are largely unquantified.

APPENDIX E

Decision dated May 30, 1975, Expenditures for the legal expenses of Indian tribes, The Comptroller General of the United States, Washington, D.C.

E-1

DECISION

[SEAL]

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-114868

DATE: May 30, 1975

MATTER OF: Expenditures for legal expenses of Indian
tribes

DIGEST: Snyder Act, 25 U.S.C. § 13, provides discretionary authority for Secretary of the Interior to pay for attorney's compensation and expenses incurred by Indian tribes from appropriations for purposes of improving and protecting resources under jurisdiction of Bureau of Indian Affairs, if Indians have insufficient funds to obtain such services.

This decision to the Secretary of the Interior is in response to a request of the Solicitor, Department of the Interior, by letter dated November 27, 1974 (together with enclosures), for our decision regarding authorization for expenditures to pay for attorney's fees incurred by Indian tribes.

The Solicitor cited the Secretary of the Interior's decision of June 4, 1974, regarding a Northern Cheyenne Tribe petition as one situation raising the question of authority to pay for tribal legal expenses. In that decision the Secretary granted part of a petition by the Tribe to withdraw departmental approval of leases and permits to stripmine coal on the Northern Cheyenne Reservation, denied part of the petition, referred some questions to an administrative hearing and held others in abeyance. The

Secretary stated in the decision that he would support the tribe in a lawsuit against the coal companies or a request that the Justice Department under 25 U.S.C. § 175 (1970) bring a suit in the name of the Tribe to test the validity of the permits and leases. Because of "extraordinary circumstances," including the substantial sums of money expended in presenting the petition, the Secretary stated that:

"* * * to the fullest extent permitted by my statutory authority, I will defray the expenses to be subsequently borne by the Tribe for attorney's fees and other costs in the administrative proceeding I have directed to take place and in any litigation it now wishes to commence against the companies."

There is mentioned in the enclosure with the Solicitor's letter the case of *Pyramid Lake Paiute Tribe of Indians v. Morton*, 499 F.2d 1095 (D.C. Cir. 1974). The United States Court of Appeals for the District of Columbia reversed a district court decision (360 F.Supp. 669 (D.D.C. 1973)) awarding attorney's fees and expenses to an Indian tribe which had successfully challenged regulations promulgated by the Secretary of the Interior. The district court had ruled that in view of 25 U.S.C. §§ 175 and 476, the provisions in 28 U.S.C. § 2412 excluding the award of attorney's fees in cases arising out of suits against Government officials did not bar the tribe from making claim for attorney's fees arising from a suit which was founded on the contention that the Secretary had breached a trust owed to the tribe. The Court of Appeals citing *United States v. Gila River Pima-Maricopa Indian Community, infra*, held that the district court's discernment of the cited statutory authority to award attorney's fees was in error and in the absence of a statute expressly authorizing the award of legal fees and expenses against the United States, the district court was without authority to do so. The Solicitor attached to his letter corre-

spondence from Members of the Senate Judiciary Committee urging the Secretary to settle the controversy in *Pyramid Lake* by using appropriated funds to satisfy the original award.

In light of these two situations, the Solicitor asks if the Secretary of the Interior is authorized to pay tribal legal expenses including attorney's fees from appropriated funds in cases where (1) the Government is not an adverse party, (2) where the Government is potentially in an adversary role and (3) where the Government may be brought into the matter as an essential party.

Legal representation may be provided to Indians by a United States attorney pursuant to 25 U.S.C. § 175 (1970), which provides that—

“In all States and Territories where there are reservations or allotted Indians the United States attorney shall represent them in all suits at law and in equity.”

This duty has been construed as a discretionary one, and the Attorney General has been held to have properly refused to represent tribes in cases presenting a conflict of interest where the United States was a party and where it was not. *Siniscal v. United States*, 208 F.2d 406, 410 (9th Cir. 1953), *cert. denied*, 348 U.S. 818 (1954); *United States v. Gila River Pima-Maricopa Indian Community*, 391 F.2d 53, 56 (9th Cir. 1968); *Rincon Band of Mission Indians v. Escondido Mutual Water Company*, 459 F.2d 1082, 1085 (9th Cir. 1972); *Salt River Pima-Maricopa Indian Community v. Arizona Sand and Rock Company*, 353 F. Supp. 1098, 1100 (D. Ariz. 1972).

In cases in which the Attorney General declines to provide representation, Indian tribes are authorized to employ counsel at their own expense, the choice of counsel and fixing of fees being subject to approval of the Secre-

tary of the Interior. 25 U.S.C. §§ 476, 81-82a. Funds for the compensation and expenses of attorneys so employed have been regularly appropriated by Congress (in the Department's annual appropriation acts) from tribal trust funds. See, *e.g.*, Department of the Interior and Related Agencies Appropriation Act, 1975, Pub. L. No. 93-404, 88 Stat. 803, 811.

The basic statutory authority for expenditure of funds appropriated for the benefit of Indians is found in the Snyder Act, ch. 115, 42 Stat. 208 (1921), 25 U.S.C. § 13 (1970), which provides as follows:

"The Bureau of Indian Affairs, under the supervision of the Secretary of the Interior, shall direct, supervise, and expend such moneys as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians throughout the United States for the following purposes:

"General support and civilization, including education.

"For relief of distress and conservation of health.

* * * *

"And for general and incidental expenses in connection with the administration of Indian affairs."

The Senate report accompanying H.R. 7848, 67 Congress (enacted as the Snyder Act), set forth the following explanation of the necessity for passage of the bill as contained in a letter from the Acting Secretary of the Interior (S. Rep. No. 294, 67th Cong., 1st Sess. (1921):

"While the Indian appropriation bill for the fiscal year 1922 was under consideration in the House of Representatives points of order were made and sustained on a number of items appearing in the bill because of the fact that there was no basic law authorizing such appropriations.

"Section 463 of the Revised Statutes provides that 'The Commission of Indian Affairs shall * * * have the management of all Indian affairs and all matters arising out of Indian relations.' This law was enacted July 9, 1832. As treaties were made with various tribes and reservations set aside for them, the Indian problem became more complicated, and numerous activities have been undertaken in order to more speedily bring about the civilization of the Indian tribes of the United States. There has been no specific law authorizing many of the expenditures for the benefit of the Indians. Congress, however, has continued to make appropriations to carry on the activities of the Indian Service.

"In view of the fact that there is no basic law at the present time authorizing many of the items appearing in the annual Indian appropriation act, and the further fact that the bill in question would give Congress authority to appropriate for the expenses of the Indian Service for all necessary activities, it is recommended that H.R. 7848 be enacted into law."

See also 61 Cong. Rec. 4659-4672 (1921). The Supreme Court in commenting on the above-quoted provisions of the Snyder Act has stated, "[t]his is broadly phrased material and obviously is intended to include all BIA activities." *Morton v. Ruiz*, 415 U.S. 199, 208 (1974).

While the legislative history of the Snyder Act contains few specific references to what Congress considered within the class of "all necessary activities" authorized, provisions for compensation and expenses of attorneys had been included in prior Indian Service appropriations. Although there apparently were appropriations for the payment of private attorneys in cases involving public lands (see Act of March 3, 1893, ch. 209, 27 Stat. 612, 631), generally the appropriations were for attorneys employed by the

Department (i.e. Government attorneys) to protect Indian property in matters such as probate and land claims. See, *e.g.*, the Act of March 3, 1921, ch. 119, 41 Stat. 1225, 1242, and the Act of July 1, 1898, ch. 545, 30 Stat. 571, 594 (substantially reenacted each year through the Act of February 17, 1933, ch. 98, 47 Stat. 820, 825). In 1934 legal services previously justified as line items in the budget of the Bureau of Indian Affairs operations (and as line items in Interior's annual appropriation act), were transferred to the Solicitor's Office under the Secretary and apparently provided for in a lump-sum in the appropriation for the Office of the Solicitor. See the Budget for fiscal year 1935, p. xxx of the President's message and pp. 256, 257, 266, and 267 of the Budget. *Cf.* p. 299 of the Budget for fiscal year 1934.

The Bureau of Indian Affairs has executed four contracts with Indian tribes providing for payment of the tribes legal expenses, including the fees of private attorneys, incurred by those tribes. (Contract Nos. K51C14200686, dated June 13, 1972; J50C14202332A, dated July 1, 1973; M00C 14201471, dated January 18, 1974; and A00C14202884, dated June 25, 1974.) Each of these contracts cites the Snyder Act as authority for the obligations. In a letter dated May 2, 1975, conveying copies of these contracts to our Office, the Associate Solicitor for General Law, Department of the Interior, stated that each of the contracts was entered into after a finding that the Indian tribes were unable to pay for the required services.

Appropriations for the operation of Indian programs are normally available for among other things "expenses necessary to provide * * * management, development, improvement, and protection of resources and appurtenant facilities under the jurisdiction of the Bureau of Indian Affairs." This appropriation is enacted in the form of a lump-sum with no specific limitations as to use. Thus, the

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determination of what expenses are necessary for the stated purpose is left to the reasonable discretion of the Secretary.

Application to the courts has often been necessary for Indian communities to preserve their land, water and other resources. Because of the unique and pervasive relationship of the Federal Government to the Indians, the proper conduct of Government officials is frequently an issue in such litigation. The Secretary of the Interior could reasonably determine that providing legal expenses for an impecunious Indian tribe to pursue certain legal remedies is necessary for the improvement and protection of tribal resources, irrespective of whether the Government is or is not an adverse or essential party.

In light of the foregoing, and particularly the broad language and legislative history of the Snyder Act, as well as our obligation to liberally construe statutes passed for the benefit of Indians and Indian Communities (*Ruiz v. Morton*, 462 F. 2d 818, 821 (9th Cir. 1972), *aff'd mem.*, *Morton v. Ruiz*, *supra.*), it is our view that the Secretary of the Interior has the discretion to expend available appropriations to pay tribal legal expenses including attorney's fees where he determines it necessary to do so, subject to the limitations set forth below. In cases where the opposing party is not the United States, 25 U.S.C. § 175 (providing for representation by United States attorneys) would bar the use of appropriate funds, except in cases in which the Attorney General refused assistance or in which his assistance was not otherwise available. In this regard, we note that one of the contracts executed by BIA to pay (with appropriated funds) for Indian legal expenses provided for a Special Counsel to act for the San Pasquale Band of Mission Indians in litigation and agency proceedings where the United States Attorney was already representing the Band (Contract No. J50C14202332A, dated July 1, 1973), and, hence, in our

opinion was unauthorized. Similarly, we question the availability of appropriated funds to retain private attorneys to, in effect, review the Justice Department's preparation of the case involving the Northern Pueblo Tributary Water Rights Association. (Contract No. M00C 14201471, dated January 18, 1974.)

In light of congressional appropriations for attorneys fees from tribal trust funds, the practice of the Department in contracting to pay for such fees only where it was found that the Indians were unable to pay, and the obligation of the Secretary of the Interior to determine that it is necessary to pay such fees for the protection of Indian resources, it would seem appropriate that before such expenditures are made by the Secretary there be a finding that the Indians have insufficient funds to otherwise obtain those services. The Department's prior practice of obtaining specific authority for general legal assistance to Indians irrespective of their financial status (such as the appropriations to provide probate and land claim services cited above) is support for this position.

In view of the past practice of the Department, if the Secretary wishes to pay general legal expenses and attorneys fees for Indian tribes irrespective of their independent ability to pay, we recommend that he request Congress for specific authority and appropriations for such purpose.

The question presented is answered accordingly.

/s/ Elmer B. Staats
ELMER B. STAATS
Comptroller General
of the United States



No. 8 Original

Supreme Court, U. S.

FILED

APR 7 1978

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1977

STATE OF ARIZONA,

Complainant

v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA,

Defendants

THE UNITED STATES OF AMERICA AND STATE OF NEVADA,

Interveners

STATE OF UTAH AND STATE OF NEW MEXICO,

Impleaded Defendants

**BRIEF IN SUPPORT OF PETITION OF INTERVENTION
ON BEHALF OF THE FORT MOJAVE TRIBE, THE
QUECHAN TRIBE OF THE FORT YUMA INDIAN
RESERVATION, THE CHEMEHUEVI INDIAN TRIBE,
THE COLORADO RIVER INDIAN TRIBES AND THE
CONFEDERATION OF INDIAN TRIBES OF THE
COLORADO RIVER; AND THE NATIONAL CONGRESS
OF AMERICAN INDIANS AS AMICUS CURIAE**

RAYMOND C. SIMPSON, Attorney for
Petitioners, the Fort Mojave Tribe,
the Quechan Tribe of the Fort Yuma
Indian Reservation, the Chemehuevi
Indian Tribe, the Colorado River
Indian Tribes and the Confederation
of Indian Tribes of the Colorado
River; and the National Congress of
American Indians as Amicus Curiae

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and Brief, December 23, 1977

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IN THE
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OCTOBER TERM, 1977

No. 8 Original

STATE OF ARIZONA,
Complainant

v.

STATE OF CALIFORNIA, ET AL.,
Defendants

UNITED STATES OF AMERICA,
Intervener

**BRIEF IN SUPPORT OF PETITION OF INTERVENTION
ON BEHALF OF THE FORT MOJAVE TRIBE, THE
QUECHAN TRIBE OF THE FORT YUMA INDIAN
RESERVATION, THE CHEMEHUEVI INDIAN TRIBE,
THE COLORADO RIVER INDIAN TRIBES AND THE
CONFEDERATION OF INDIAN TRIBES OF THE
COLORADO RIVER; AND THE NATIONAL CONGRESS
OF AMERICAN INDIANS AS AMICUS CURIAE**

INTRODUCTION

**A. The Solicitor General Violates The Code of Professional
Responsibility In The Case Of Arizona v. California**

There is incorporated into this Brief in support of the
Petition of Intervention the

“Motion for Leave to Intervene as Indispensible Par-
ties by the Fort Mojave Indian Tribe, the Cheme-

huevi Indian Tribe, and the Quechan Tribe of the Fort Yuma Indian Reservation; Joined in by the National Congress of American Indians as Amicus Curiae"

and the Brief in support of the Motion, filed December 23, 1977.

In that Motion and Brief filed December 23, 1977, there is fully set forth a review of the pertinent authorities in support not only of that Motion but of this Petition of Intervention of which this Brief is in support. Particular reference is made to Appendix A of the Motion of the Tribes setting forth their rejection of further representation by the Solicitor General and their refusal to be bound by further action of the Solicitor General in the case of *Arizona v. California*. That need by the Tribes to take protective measures against the conduct of the Solicitor General of the United States became imperative when the Solicitor General, in disregard of the Tribes' interests, had proceeded to negotiate and to conditionally agree upon a supplementary decree, as proposed by the States and the California Defendants in the Joint Motion filed May 3, 1977.¹ Chronicled in the Tribes' Motion and Brief is the unconscionable conflicts of interest within the Department of Justice in this case.² From the inceptive moments when the Department of Justice filed its original petition of intervention in *Arizona v. California*, the politically powerful States and the California Defendants imposed their will upon the United States Attorney General forcing him from his originally strong position for the Tribes. So powerful were those non-federal agencies that the original petition of intervention was reviewed by Congressional committees interested in Indian affairs.³

¹ Motion of the Tribes, p. 4, "Imperative Need to have Resolved All Issues in *Arizona v. California*."

² *Ibid.*, p. 5.

³ Brief of the Tribes, p. 15.

The failure of the Solicitor General to properly represent the Indians, by himself or those under his direction, has resulted in irreparable damage to the Tribes and that damage is continuing to this moment.⁴

B. Specific Violations By The Solicitor General Of The "Code Of Professional Responsibility" In Arizona v. California

The charges directed by the Tribes on December 23, 1977, all as set forth in the Motion and Brief, come clearly within the purview of the code of ethics as adopted by the American Bar Association. It is specifically provided as follows in that code:

*"A government lawyer in a civil action or administrative proceeding has the responsibility to seek justice and to develop a full and fair record, and he should not use his position or the economic power of the government to harass parties or to bring about unjust settlements or results."*⁵

As alluded to above, the history of the case of *Arizona v. California* is replete with instances where the Solicitor General and the Secretary of the Interior, whom he primarily represents, are diametrically opposed to the petitioning Tribes' interests. This course of conduct by the Solicitor General and the Secretary of the Interior is reviewed in full in the Petition of Intervention of which this Brief is in support.⁶

⁴ Petition of Intervention, pp. 10 *et seq.* See in particular the Affidavit of Charles P. Corke, who has the greatest familiarity and longest experience in regard to the all-pervasive conflicts of interest within the Interior Department. That Affidavit is Appendix B of the Petition of Intervention.

⁵ American Bar Association, Code of Professional Responsibility, EC 7-14. (Emphasis Supplied)

⁶ Petition of Intervention:

p. 10, para. IV—"The United States Has Willfully Failed to Maintain Communications with the Tribes Who Are Clients/Beneficiaries."

[Footnote continued on page 4]

The Biblical injunction that no man can serve two masters is especially applicable to the Solicitor General in *Arizona v. California*. Primarily, that high official of the Department of Justice is the lawyer before the Supreme Court for the Secretary of the Interior in the case in question. As a consequence, the Solicitor General appears primarily to represent the Interior Department's interests, which are in *Arizona v. California* widely disparate from the interests of the Tribes which are here involved. That unconscionable conflict of interest is well known to both the Solicitor General and to the Secretary of the Interior.

It is most relevant in regard to those conflicts of interest that both the Executive Branch and the Legislative Branch of the United States Government have been confounded by the magnitude of the conflicts of interest and have endeavored to take corrective action. So serious have been the conflicts of interest within the Department of Justice, including specific reference to *Arizona v. California*, that there was introduced into the Congress a bill "To Provide For The Creation Of The Indian Trust Counsel Authority, And For Other Purposes."⁷ In the

⁶ [Continued]

p. 10—"Interior's Policy to Limit or Prevent the Exercise of Indian 'Present Perfected Rights' on the Lower Colorado River—the Essence of All-Pervasive Conflicts of Interest." See in that connection, Affidavit of Charles P. Corke, Appendix B attached to the Petition of Intervention.

p. 12—"The United States' Refusal to Establish Boundaries on the Indian Reservations, A Corollary to Interior's Policy to Preclude Exercise of Indian 'Present Perfected Rights.'"

p. 17, para. XI—"Irrigable Lands for which the Tribes Are Entitled to 'Present Perfected Rights' Are Arbitrarily and Capriciously Abandoned in *Arizona v. California*."

⁷ Indian Trust Counsel, Hearings before the Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs, United States Senate, 92nd Congress, 1st Session on S. 2035 "A Bill To Provide For The Creation Of The Indian Trust Counsel Authority, And For Other Purposes." November 22 and 23, 1971.

report referred to below is a copy of the bill originally proposed. Most significant is the letter from the then Secretary of the Interior Rogers C. B. Morton. That letter, dated April 28, 1971, reviewed in detail the seriousness of the problem confronting the Indian people. On the subject, Secretary Morton had this to say:

"The Indians of our country have for years felt that the Federal government, because of the inherent conflict of interests that the President discussed in his message, has not given their rights adequate legal protection. We believe that this bill will restore the confidence of the American Indian in the ability of our government to give their natural resource rights legal protection to which they are entitled. This will make it clear to the American Indian that the United States is meeting the legal obligation it has as trustee to advance the interest of the beneficiaries of the trust without reservation and to the highest degree of its ability and skill." *

Similarly, by a letter dated November 26, 1971, the then Deputy Attorney General of the Department of Justice wrote to the Chairman of the Senate Committee on Indian Affairs, United States Senate, declaring that: "The Department of Justice recommends enactment of this legislation." It is most pertinent that both the Secretary of the Interior and the Attorney General of the United States endorsed the legislation. In fact, the then Attorney General stated:

"We in the Justice Department fully support this legislation. We believe that our current position is untenable and regardless of the practice of bureaucracies in the past maintain each and every vestige of power representation that they can, we in this particular case are glad to give it up." *

* *Ibid.*, p. 12.

* *Ibid.*, p. 15.

Incongruously, seven years later, the Tribes on the Lower Colorado River are being harassed by the grossly inadequate representation of the Solicitor General of the United States. Reference is again made to the shocking violations of the precepts of proper professional conduct as formulated by the American Bar Association. There it is provided, among other things, that:

"If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues the employment. He should resolve all doubts against the propriety of the representation. *A lawyer should never represent in litigation multiple clients with differing interests, and there are few situations in which he would be justified in representing in litigation multiple clients with potentially differing interests.*"¹⁰

Underscoring that major tenet of professional conduct by lawyers—especially one of the status of the Solicitor General—is the precept of conduct so flagrantly violated by that official:

"The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client."¹¹

¹⁰ American Bar Association, Code of Professional Responsibility, EC 1-15. (Emphasis supplied)

¹¹ *Ibid.*, EC 5-1.

**THE TRIBES' "PRESENT PERFECTED RIGHTS"
ARE INVALUABLE INTERESTS IN REAL PROPERTY**

The issues here are not academic. Involved are some of the most valuable interests in real property on the face of the earth.¹² Moreover, the Tribes' rights are not Federal rights. Rather, full equitable title resides in the Tribes with the interest of the United States being that of a trustee whose sole obligation is to preserve and protect the Tribes' rights.¹³ That the title to those rights was long ago recognized by the Congress is beyond successful challenge.¹⁴

**EFFORTS TO APPROVE THE "PRESENT PERFECTED
RIGHTS" OF THE DEFENDANTS BUT NOT THOSE OF
THE TRIBES ARE A BREACH OF TRUST**

While agreeing conditionally to the grossly inflated claims of the Defendants, the Department of Justice lamely explains its failure to protect the "present perfected rights" of the Tribes in these terms:

"At present there is not sufficient hydrological and technical data to adjudicate these claims. However, we believe, as in the case of lands ultimately determined to be within reservation boundaries, that adoption of the proposed supplemental decree under Article VI in no way forecloses a later claim for such lands under Article IX."¹⁵

It is manifest that the Department of Justice would first prefer to allow the Court to render and enter an

¹² See Tribes' Brief in support of Motion, p. 10.

¹³ *Ibid.*, p. 11.

¹⁴ *Arizona v. California*, 373 U.S. 546, 599-601 (1963); see Tribes' Brief in support of Motion, pp. 10, *et seq.*

¹⁵ See Response of the United States in Opposition to the Tribes' Motion, pp. 10-11.

erroneous and inadequate decree before it applies to the Court for a correct decree. And, given the past conduct of the Department of Justice in asserting tribal claims, the fact that it will indeed apply for a correction to the decree cannot be taken for granted. Instead, if tribal lands are omitted from the final decree, future generations will be saddled with the burden of prodding a reluctant trustee into securing relief.

It is the position of the Tribes that as parties they will be able to be assured of representation which is competent, free from conflicts and of their own choosing. They have rejected the proposed settlement on "present perfected rights." The Tribes' rejection underscores¹⁶ the need for independent representation free from bureaucratic conflicts of interest.

FAILURE OF THE UNITED STATES TO CONSULT WITH THE TRIBES

Chairman Llewellyn Barrackman of the Fort Mojave Indian Tribe and the Confederation of Indian Tribes of the Colorado River has set forth in his affidavit a full chronicle of the failure of the United States to consult or confer with the Tribes. That failure cannot be attributed to mere oversight. For years, the Solicitors Office of the Department of the Interior and the Department of Justice conferred with the States in regard to the issues of "present perfected rights." Ultimately, the resolution was presented to the Tribes as a *fait accompli*. The rejection by the Tribes of the negotiated settlement of all "present perfected rights" except those of the Indians (as set forth in the Petition of Intervention) demonstrates the magnitude of the error on the part of the trustee United States.¹⁷

¹⁶ See Petition of Intervention, pp. 6 *et seq.*

¹⁷ *Ibid.*, p. 6.

The refusal to keep the Tribes informed was a simple—but now known to be—futile effort on the part of the trustee to hide the overwhelming conflicts of interest which pervade the attempt to settle some of the “present perfected rights” but not those of the Tribes.

**THE INADEQUATE REPRESENTATION OF THE
UNITED STATES IN ARIZONA v. CALIFORNIA ON
BEHALF OF THE TRIBES IS A MANIFEST BREACH
OF TRUST REQUIRING INDEPENDENT
REPRESENTATION OF THE TRIBES**

“The overriding duty of our Federal Government to deal fairly with Indians wherever located has been recognized by this Court on many occasions.”¹⁸

The life-blood of our Anglo-American concept of trust relationships centers upon the fiduciary duties of the trustee toward the beneficiary. It is elementary that fiduciaries are obligated to observe the utmost loyalty to those with whom they are in a fiduciary relationship and to refrain from all manner of self-dealing whereby the fiduciary may be tempted to place the interests of his beneficiaries second to his own.¹⁹

Besides the obligation to remain loyal to the beneficiary and refrain from self-dealing, it is well settled that the officers of the United States are obligated to exercise care, skill and diligence in protecting, preserving, utilizing and conserving the invaluable “present perfected rights” of the Tribes to the Colorado River waters.²⁰

As detailed elsewhere in this Brief and the Tribes’ Motion and Brief, the performances of the Solicitors

¹⁸ *Morton v. Ruiz*, 415 U.S. 199, 236 (1974).

¹⁹ Restatement 2d, Trusts Secs. 170 *et seq.*

²⁰ “Federal Encroachment on Indian Water Rights and the Impairment of Reservation Development,” in *Toward Economic Development for Native American Communities*, Joint Economic Comm., 91st Cong., 1st Sess., pp. 484, 490.

Office of the Interior Department and the Justice Department are permeated with conflicts of interest which prejudice the interests of the tribal beneficiaries.²¹ This intolerable situation is further aggravated by the incompetency demonstrated by allowing the ambiguities, errors, defects and distortions of the Joint Motion to go uncorrected. Indeed, it may very well be that the failure to adequately represent the tribal interests is due in large part to the conflicts of interest of the government.

In other cases, the violations of the Tribes' rights by the Solicitors Office have been carefully reviewed, checked and rechecked in response to Congressional inquiries.²²

It is obvious even now that the breaches of trust by the United States will be of a continuing nature as illustrated by the Response filed to the Proposed Decree. Therein, also mentioned elsewhere in this Brief, the United States "conditionally accepted" a stipulation which contains numerous significant ambiguities with full knowledge that in the future the ambiguities would inevitably bring controversy.²³

The Court has had the opportunity on numerous occasions to adjudicate the grounds for removal and substitution of a trustee.

²¹ *Supra*, pp. 1 *et seq.*; see Tribes' Motion, p. 9, para. XVIII *et seq.* and Brief pp. 14 *et seq.*

²² "Federal Protection of Indian Resources," Hearings before the Subcomm. on Administrative Practice and Procedure of the Comm. on the Judiciary, U.S. Sen., 92d Cong., 1st Sess., on Administrative Practices and Procedures Relating to Protection of Indian Natural Resources, Part 1, Oct. 19 & 20, 1971, pp. 233 *et seq.*

²³ See "Response of the United States to Joint Motion for a Determination of Present Perfected Rights and Entry of a Supplemental Decree," filed November 10, 1977, by Wade H. McCree, Jr., Solicitor General, Department of Justice, Washington, D.C. 20530, p. 1.

For example, the Court has stated that where the acts or omissions of a trustee are such as to show a want of reasonable fidelity, a court of equity will remove him.²⁴

Additionally, the power of a court of equity to remove a trustee and to substitute another in his place is incidental to its paramount duty to see that trusts are properly executed and may properly be exercised whenever such a state of mutual ill feeling, growing out of his behavior, exists between the trustees or between the trustee in question and the beneficiaries, so that the trustee's continuation in office would be detrimental to the execution of the trust, even if for no other reason than that human infirmity would prevent the co-trustee or the beneficiaries from working in harmony with him, and although charges of misconduct against him are either not made out or are greatly exaggerated.²⁵

THE TRIBES ARE ENTITLED TO INTERVENE AS A MATTER OF RIGHT OR AT THE DISCRETION OF THE COURT

By ignoring the Court's own inherent power to grant the relief requested by the Tribes, it has been suggested by the State parties in their response to Petitioners' Motion²⁶ that the Tribes adhere to the Federal Rules of Civil Procedure Rule 24.²⁷ The Tribes disagree with this con-

²⁴ *Cavender v. Cavender*, 114 U.S. 464, 472 (1885).

²⁵ *May v. May*, 167 U.S. 310, 320 (1897).

²⁶ Response of the States, January 1978, pp. 9-11, 22.

²⁷ Rule 24. Intervention

"(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action. . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the

tention since the United States has already successfully intervened on their behalf. The Tribes are effectively real parties in interest to this litigation by virtue of their declared "present perfected rights," although they do not have their own independent counsel.

**THE NEED FOR INDEPENDENT COUNSEL FREE
FROM CONFLICTS OF INTEREST IN ALL
PHASES OF ARIZONA v. CALIFORNIA
IS FULLY DOCUMENTED**

In the affidavit of Charles P. Corke,²⁸ there is reviewed in detail the breadth of the damage to the Tribes by the failure of the trustee to perform on behalf of the Tribes or to allow the Tribes to act on their own behalf. Reference is there made to the refusal to provide electrical power on a preferential basis, greatly impeding reservation development of "present perfected rights."

Complementing the threat to the Tribes by the refusal to provide electrical energy, as required by law, is the threat of intentional flooding of tribal irrigable land by the Bureau of Reclamation.²⁹ That threat by the trustee

applicant's interest is adequately represented by existing parties.

"(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action. . . . (2) when an applicant's claim or defense and the main action have a question of or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

²⁸ Petition of Intervention, Appendix B.

²⁹ As summarized by the Bureau of Reclamation in the abstract at page iii in "River Flows Between Davis Dam and Yuma, Arizona; Lower Colorado River; A Forecast of Conditions and Impacts for the period, 1977 to 1986," dated October 1976:

"This report presents data from Bureau of Reclamation water supply forecast studies to evaluate the possibility of high-

demonstrates the disregard of the Tribes' interest in favor of non-Indians who will benefit from the increase of power generated through that type of water management.

CONCLUSION

The ratification of the errors, ambiguities and distortions, together with the proffered concessions contained in the Response of the Solicitor General to the Joint Motion will cause irreparable and continuing damage to the Tribes.

The Court is being asked to consider and incorporate into its Final Decree a document which will be immediately subject to amendment and revision—its Proposed Decree is already obsolete.

Additionally, this Proposed Decree is the result of an unfortunate conflict of interest within the United States Government. Except for the unique posture of the American Indians to the Federal Government, no other law firm or court, would stand long for this type of blatant conflict of interest.

The United States has not maintained meaningful communication with its beneficiaries, it has not remained loyal solely to the Tribes' best interests and it has advocated a Proposed Decree which diminishes the tribal property rights due to its deficiencies.

With such enormous repercussions at stake, the Tribes feel that it is time they be allowed to maintain independent counsel for themselves instead of being represented by the United States. Like other citizens, the Tribes herein should also enjoy the most effective representation possi-

volume flows below Davis Dam in the 10-year period 1977 to 1986. It is indicated that sustained flows in the range 30,000 to 40,000 ft³/s are probable. . . . and it is indicated that water levels 4 to 10 feet above normal maximums are probable."

ble. To hold otherwise would be tragic, for it sanctions a discriminatory double-standard of legal representation between Indians and non-Indians.

In closing, the Tribes echo one of their opening quotations:

"A government lawyer who has discretionary power relative to litigation should refrain from instituting or continuing litigation that is obviously unfair. . . . A government lawyer in a civil action or administrative proceeding has the responsibility to seek justice and to develop a full and fair record, and he should not use his position or the economic power of the government to harass parties or to bring about unjust settlements or results."³⁰

By granting the Tribes' prayer for relief, the crisis confronting them will be removed.³¹

Respectfully submitted,

RAYMOND C. SIMPSON, Attorney for
Petitioners, the Fort Mojave Tribe,
the Quechan Tribe of the Fort Yuma
Indian Reservation, the Chemehuevi
Indian Tribe, the Colorado River
Indian Tribes and the Confederation
of Indian Tribes of the Colorado
River; and the National Congress of
American Indians as Amicus Curiae

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Palo Verdes Estates, CA 90274

DATED: April 7, 1978

³⁰ See *supra*, note 5.

³¹ Tribes' Petition of Intervention, pp. 22 *et seq.*



MOTION FILED
APR 10 1978

In the
Supreme Court of the United States
October Term, 1977

No. 8, Original

STATE OF ARIZONA,

Complainant,

vs.

STATE OF CALIFORNIA, PALO VERDE
IRRIGATION DISTRICT, IMPERIAL
IRRIGATION DISTRICT, COACHELLA
VALLEY COUNTY WATER DISTRICT,
THE METROPOLITAN WATER DISTRICT
OF SOUTHERN CALIFORNIA, CITY OF
LOS ANGELES, CITY OF SAN DIEGO, and
COUNTY OF SAN DIEGO,

Defendants,

UNITED STATES OF AMERICA and
STATE OF NEVADA,

Intervenors,

STATE OF NEW MEXICO and STATE OF UTAH,

Impleaded Defendants.

**Motion of the Colorado River Indian Tribes and the
Cocopah Indian Tribe for Leave to Intervene and
Petition of Intervention.**

April 10, 1978

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**Motion of the Colorado River Indian Tribes and the
Cocopah Indian Tribe for Leave to Intervene**

April 10, 1978



The Colorado River Indian Tribes and the Cocopah Indian Tribe (hereinafter sometimes referred to as the "two Tribes") are tribes duly organized under the Indian Reorganization Act of June 18, 1934, 48 Stat. 984, 25 U.S. Code § 461 et. seq., and recognized as such by the United States. Individually and collectively, they move this Court for leave to file a Petition of Intervention, and in support thereof state as follows:

I

INTRODUCTION

In 1952 this Court exercised the original jurisdiction vested in it under Article III, Section 2 of the United States Constitution to entertain this suit. After preliminary pleadings were filed, the Court referred this case to a Special Master, who filed his report with the Court on January 16, 1961, at 364 U.S. 940 (1961). On June 3, 1963, the Court rendered its opinion in this case, 373 U.S. 546 (1963), and on March 9, 1964, the Court entered a corresponding Decree (hereinafter referred to as the "Decree"), 376 U.S. 340 (1964), which was amended on February 28, 1966, 383 U.S. 268 (1966).

Although the Court then determined the principal issues involved in the suit, it reserved ruling upon several related questions. The Court consequently provided procedures for future determination of those unresolved issues in Article II(D)(5), Article VI and Article IX of the Decree.

Invoking Article VI of the Decree, on May 3, 1977, the State of Arizona, Complainant, the California Defendants and the State of Nevada, Intervenor, (hereinafter referred to as the "States") filed a Joint Motion for a Determination of Present Perfected Rights and the Entry of a Supplemental Decree; Proposed Supplemental Decree; and Memorandum in Support of Proposed Supplemental

Decree (hereinafter collectively referred to as the "Joint Motion"). On November 10, 1977, the United States filed its Response to the Joint Motion.

Subsequently, the States filed their Reply (dated February 27, 1978) to the Response of the United States, in which it is asserted that the States and the United States have reached agreement upon the language of the proposed Supplemental Decree.

The two Tribes approve and request the entry of a Supplemental Decree in accordance with the Joint Motion, but in the modified form presented in the Reply of the States dated February 27, 1978.

In January of 1978, the Fort Mojave Indian Tribe, the Chemehuevi Indian Tribe and the Quechan Tribe of the Fort Yuma Indian Reservation filed a Motion for Leave to Intervene as Indispensible Parties joined in by the National Congress of American Indians as *amicus curiae*. The two Tribes (Colorado River Indian Tribes and the Cocopah Indian Tribe) now also seek this Court's permission to intervene in this action.

It is appropriate and in the interests of justice to present for contemporary consideration by this Court all matters and issues raised by all interested parties which are now ripe for adjudication.

II

THE TWO TRIBES' INTERVENTION IS JUSTIFIED TO PREVENT FURTHER IRREPARABLE HARM

In 1953 the Court allowed the United States to intervene for itself and on behalf of certain Indian tribes, including the two Tribes, who were and remain beneficial owners of water rights in the Colorado River which are the subject of this action. The United States has been

charged with the fiduciary duty of representing the two Tribes and their interests herein. However, the government has not adequately discharged its duty, causing an agonizing and unreasonable delay in the final perfection of some of the rights of the two Tribes to water in the Colorado River. Until all of such rights are finally perfected, the two Tribes will continue to suffer irreparable harm in that they are unable, through no fault of their own, to fully establish, develop and derive benefit from their water rights. Furthermore, the two Tribes' losses inure annually to the benefit of others whose interests are subordinate, but who utilize water to which the two Tribes would be entitled if their rights were perfected. Such use of that water by those whose claims are inferior will inevitably create a dependency which will influence and inflame opposition to the two Tribes' subsequent efforts to perfect and utilize their rights. Hence, it is submitted that there is urgency and necessity for the two Tribes to intervene in this matter to prevent further irreparable harm.

III

THE GOVERNMENT'S CONFLICTS OF INTEREST JUSTIFY INDEPENDENT PARTICIPATION BY THE TWO TRIBES

Throughout the course of this action the representatives of the government have had the awkward and perhaps impossible task of fully representing the United States and its agencies while simultaneously representing the two Tribes and other Indian tribes, whose interests in certain respects appear to be adverse to those of the United States and its agencies. Furthermore, the dual representation which creates the conflict does not arise solely within this action. Perhaps the most significant illustration of that point is the concurrent representation of affected Indian tribes and the Interior Department's Bureau of Reclamation, which has extensive agreements with several states to

construct and operate large federal reclamation and irrigation projects utilizing great quantities of Colorado River water.

The United States has a dominant role in the control and allocation of water and the management of the entire multi-state basin of the Colorado River, as demonstrated by the definitions and provisions of the Decree. It administers such comprehensive programs as those established by the Boulder Canyon Project Act, 45 Stat. 1057 (1928), 43 U.S. Code §§617-617t, and the Colorado River Basin Project Act (Central Arizona Project), P.L. 90-537 (1968), 82 Stat. 885, 43 U.S. Code §§1501-1556. Its functions inevitably cause conflicting demands upon the United States, including those made by Indian tribes and federal and state entities. Furthermore, direct and indirect interests of various Indian tribes in the water of the Colorado River differ in scope and extent, and in some circumstances may even be in conflict with each other. Consequently, it is asserted that the responsible legal representatives of the United States are placed in an untenable position in attempting to adequately protect all of the differing interests. This is so despite their sincere effort to take a position not in active opposition to the interests of the Indian tribes. The two Tribes therefore should have the opportunity for independent participation in the adjudication of their water rights in this action.

The effect of representing multiple parties having differing interests, whether or not they are all involved in a single legal proceeding, and whether their interests are direct or indirect, may be a compromise of one party's interest in favor of another's, even if done in good faith. An inability to fairly dispose of a conflict of interest also may result in excessive delay in resolving the entire subject matter, which may have occurred in this case.

Congress has recently recognized these very problems

and has responded by enacting legislation authorizing independent representation of Indians in conflict situations. Act of January 4, 1975, P.L. 93-638, 88 Stat. 2203, 25 U.S. Code §450f; See *State of New Mexico v. Aamodt*, 537 F.2d 1102 (10th Cir., 1976), *cert. den.* 429 U.S. 112. In this instance the United States has several apparent or potential conflict situations, and as authorized by Congress, the two Tribes therefore should be allowed independent representation to prevent further irreparable harm.

IV

THE GOVERNMENT'S FAILURE TO TIMELY ASSERT CLAIMS OF THE TWO TRIBES TO ADDITIONAL PRESENT PERFECTED RIGHTS RESULTING FROM RESOLUTION OF BOUNDARY DISPUTES JUSTIFIES INTERVENTION BY THE TWO TRIBES

At the time that the Court entered the Decree, there were known boundary disputes involving the Colorado River Indian Reservation (the reservation of one of the two Tribes), and one other reservation. Recognizing that the tribes residing there would be entitled to additional diversions from the Colorado River upon favorable final determinations of those disputes, the Court expressly provided in Article II(D)(5) of the Decree that the quantities of adjudicated water to which each of those tribes is entitled thereunder "shall be subject to appropriate adjustment by agreement or decree of this Court in the event that boundaries of the respective reservations are finally determined." Neither the Court, the parties to this action, nor the Cocopah Indian Tribe were then aware of a boundary dispute involving the Cocopah Indian Reservation, and therefore the Court did not expressly provide in the Decree for such adjustment to be applicable to any boundary dispute involving Cocopah lands. However, the Court did provide a

means of redress for the benefit of any of the affected Indian tribes by providing in Article IX of the Decree as follows:

Any of the parties may apply at the foot of this Decree for its amendment or for further relief. The Court retains jurisdiction of this suit for the purpose of any order, direction or modification of the Decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy.

The two Tribes are currently entitled to have decreed to each of them additional present perfected rights in the waters of the Colorado River because of favorable determinations of disputes over the boundaries of their respective reservations. However, the government has failed to seek adjudication of such additional present perfected rights.

The two Tribes recognize that adjudication of such additional present perfected rights upon the resolution of boundary disputes does not fall within the scope of the procedure set forth in Article VI of the Decree and disposition of the pending Joint Motion. However, they submit that the determinations of priority to be made under Article VI of the Decree, and the implementation of those rights of others, will have direct legal and practical effects upon their water rights, so that all should be considered concurrently. Fair and orderly adjudication can be achieved only if the Court has before it all present, mature, pending claims. The two Tribes, if allowed by the Court to intervene, will move the Court to enter a Supplemental Decree or amend the original Decree adjudicating additional present perfected rights in the Colorado River to the two Tribes as set forth below. The two Tribes will make such motions pursuant to Articles II(D)(5) and IX of the Decree for the Court's concurrent consideration with the Joint Motion presently before the Court.

COCOPAH INDIAN RESERVATION

Subsequent to the entry of the Decree there was disclosed a boundary dispute which became the subject of *Cocopah Indian Tribe v. Morton*, CU-70-573-PHX-WEC, (D.Ariz.). On May 12, 1975, that dispute was finally resolved by the entry of a judgment, from which no appeal was sought. That judgment confirmed that an additional 883.53 acres of land, which were not determined at the time of the Decree to be part of the Cocopah Indian Reservation, are and have always been within that reservation. Of those additional acres, approximately 780 are practicably irrigable and have an annual diversion duty of 6.37 acre-feet for each such acre.

Nearly three years after the entry of that judgment, the government yet has not requested this Court to adjudicate for the Cocopah Indian Tribe the additional present perfected rights to which that tribe is entitled as a result of the favorably resolved boundary dispute. If, however, the Cocopah Indian Tribe is allowed to intervene by the Court, it will move pursuant to Article IX of the Decree for the entry of a Supplemental Decree or amendment of the original Decree adjudicating additional present perfected rights to the Cocopah Indian Tribe in the waters of the Colorado River in annual quantities not to exceed (i) 4,969 acre-feet of diversion from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 780 acres, and for the satisfaction of related uses, whichever of (i) or (ii) is less.

COLORADO RIVER INDIAN RESERVATION

By Order of the Secretary of the Interior dated January 17, 1969, approved by two successive Secretaries of the Interior by their decisions of June 2, 1970 and March 8, 1972, a major part of the western boundary of the Colorado River Indian Reservation was confirmed. It constituted resolution of some of the boundary disputes which were the

express subject of Article II(D)(5) of the Decree. The Secretarial Order was a determination that approximately 4,439 additional acres of land, which were not determined at the time of the Decree to be within the Colorado River Indian Reservation, are and always have been within that reservation. Of these additional acres approximately 2,710 net acres are practicably irrigable and have an annual diversion duty of 6.67 acre-feet for each such acre.

Three disputes involving lands within that western boundary portion of the reservation, in which additional legal and factual questions were in issue, also have been finally resolved. *United States v. Robert H. Clark, et al.*, 72-1625-RJK; *United States v. Samuel F. Curtis, et al.*, 72-1624-DWW; and *United States v. Brigham Young University, et al.*, 72-3058-DWW, each in the U.S. District Court for the Central District of California. They further confirmed the inclusion of lands within the Colorado River Indian Reservation for which water rights were not adjudicated by the Decree because of the pendency of such disputes.

More than nine years after entry of that Order the government yet has not requested this Court to adjudicate for the Colorado River Indian Tribes any additional present perfected rights to which they are entitled as a result of the resolved boundary disputes. Continued delay in perfecting the additional water rights attributable to the lands involved in resolved boundary disputes will cause further irreparable damage to the Indians.

Therefore, if this Motion to Intervene is granted by the Court, the Colorado River Indian Tribes will move pursuant to Article II(D)(5) of the Decree for the entry of a Supplemental Decree or amendment to the original Decree adjudicating additional present perfected rights to the Colorado River Indian Tribes in the waters of the Colorado River in annual quantities of (i) an estimated

18,076 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of an estimated 2,710 net acres, and for the satisfaction of related uses, whichever of (i) or (ii) is less.

V

**INTERVENTION BY THE TWO TRIBES IS
JUSTIFIED BY THE GOVERNMENT'S FAILURE
TO TIMELY ASSERT THEIR CLAIMS FOR
OTHER ADDITIONAL PRESENT PERFECTED
RIGHTS WHICH HAVE NOT BEEN
PREVIOUSLY ASSERTED ON THEIR BEHALF**

Prior to the entry of the Decree, for reasons unknown by the two Tribes, the United States failed or declined to present to the Special Master or to the Court claims for and evidence of all the practicably irrigable acreage within the then undisputed boundaries of the two Tribes' reservations, for which water rights then should have been decreed to them. That land may total approximately 37,449 practicably irrigable acres within the Colorado River Indian Reservation and a number of practicably irrigable acres within the Cocopah Indian Reservation which is presently being computed and soon shall be available for consideration.

The government's failure to assert such claims is a breach of fiduciary duty, which may have been due to conflicts of interest. It has failed on behalf of the two Tribes to seek any relief for such neglect, oversight or failure, under the authority of Article IX of the Decree or otherwise.

The 1964 Decree does not bar relief by *res judicata* with respect to such omitted practicably irrigable lands. If the government's representation involved a conflict of interest, the Indians are not now bound by the resulting Decree. *Hansberry v. Lee*, 311 U.S. 32 (1940); *Mullane*

v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950); *Manygoats v. Kleppe*, 558 F.2d 556, 558 (10th Cir. 1977); *State of New Mexico v. Aamodt*, 537 F.2d 1102, 1106-1107 (10th Cir. 1976), *cert. den.*, 429 U.S. 112; *United States v. South Pacific Transportation Corp.*, 543 F.2d 676, 680 (9th Cir., 1976), and that question can be resolved only upon consideration of evidence at a hearing.

Notwithstanding urging by the two Tribes that the government seek adjudication pursuant to Article IX of the Decree of additional present perfected rights for the omitted practicably irrigable acreage, the government has failed to do so. Therefore they submit this Motion to Intervene to allow them to assert those claims themselves.

VI

INTERVENTION IS INDEPENDENT OF CURRENT PROCEEDINGS PURSUANT TO ARTICLE VI OF THE DECREE OF MARCH 9, 1964, AND IT IS NOT UNTIMELY

The Motion to Intervene of the Fort Mojave Indian Tribe, the Chemehuevi Indian Tribe and the Quechan Indian Tribe, and the Responses thereto of the States and the United States, all involve the question of whether or not intervention and the raising by the Indians of additional claims to water rights should be included within the proceedings to determine the Joint Motion made pursuant to Article VI of the 1964 Decree.

The two Tribes on the other hand take the position that although the subjects of their Motion for Intervention may not be encompassed in the Article VI proceedings as such, they should be contemporaneously entertained by the Court. While it may be true that they are not procedurally included within consideration of the Joint Motion, it is equally true that the pendency of the Joint Motion does not preclude the submission to and considera-

tion by the Court of other motions and requests. This Motion to Intervene by the two Tribes may stand on its own merits, regardless of the pendency of the Joint Motion. It is, however, logical that they be considered as companion matters. It would be a disservice to the Court and to all affected parties and interests to proceed piecemeal in presenting for adjudication the respective claims of the parties. Additionally, the Court would be better able to determine the rights of all affected parties if it is made aware of all existing and pending claims. The Indians might even be fairly criticized if they failed now to present their claims to the Court and deliberately waited to do so until after consideration of the Joint Motion. Orderly adjudication demands that all such claims be presented to the Court at once.*

It is incongruous for the States to maintain that present Indian efforts to intervene and to present issues under Articles II and IX of the Decree should be delayed and postponed until after the Article VI proceeding is concluded, while also maintaining that such Indian efforts are untimely because they were not undertaken earlier. It is also unjust for the States to seek to bar the assertion in this action by the Indians of their unperfected water rights, while the States, and the entities they represent, continue to utilize water to which the Indians should be entitled.

Lastly, it is true that some of the claims now sought by the two Tribes to be adjudicated could have been asserted earlier. But the reason for the tardiness has been the failure of their trustee, the United States, to seek their adjudication. That is precisely the reason for their Motion to Intervene. The two Tribes should not be penalized for

*There remain two boundary disputes in the Colorado River Indian Reservation outside the area involved in the Order of the Secretary of the Interior of January 17, 1969. But because they have not yet been finally resolved, they cannot be presented to the Court at this time.

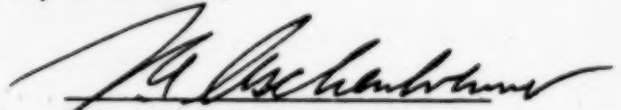
such inaction, since they have not had the opportunity to proceed in their own name and right.

Other additional claims asserted by the two Tribes are based upon quite recent resolutions of disputed boundaries. Action upon those claims must be initiated now before they too become subject to the charge that their assertion has been too long delayed and is no longer timely.

The two Tribes are experiencing the misfortune, from entry of the Decree and continuing to date, of being unable to have their claims presented to the Court as they accrue and then being told that they waited too long to present them. As each year passes, their frustration and detriment continues to build. It is therefore necessary for the two Tribes to intervene and seek relief from the Court.

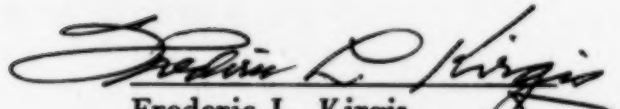
WHEREFORE, individually and collectively, the Colorado River Indian Tribes and the Cocopah Indian Tribe pray that this Court grant their Motion for Leave to Intervene and allow them to file the Petition of Intervention annexed to this Motion.

Respectfully submitted,



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**Petition of Intervention
of
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and Cocopah Indian Tribe**

April 10, 1978

The Colorado River Indian Tribes and the Cocopah Indian Tribe (hereinafter sometimes referred to as the "two Tribes") are tribes duly organized under the Indian Reorganization Act of June 18, 1934, 48 Stat. 984, 25 U.S. Code §461 et seq., and recognized as such by the United States. Individually and collectively, they submit this Petition of Intervention.

I

The Colorado River Indian Tribes and the Cocopah Indian Tribe are each currently entitled to have decreed to them additional present perfected rights in the waters of the Colorado River upon and because of favorable determinations of disputes over the boundaries of their respective reservations, pursuant to Article II (D)(5) and Article IX of the Decree herein of March 9, 1964.

The Cocopah Indian Tribe moves for the entry of a Supplemental Decree or amendment of the original Decree adjudicating additional present perfected rights to the Cocopah Indian Tribe in the waters of the Colorado River in annual quantities not to exceed (i) 4,969 acre-feet of diversion from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 780 acres, and for the satisfaction of related uses, whichever of (i) or (ii) is less.

The Colorado River Indian Tribes move for the entry of a Supplemental Decree or amendment of the original Decree adjudicating additional present perfected rights to the Colorado River Indian Tribes in the waters of the Colorado River in annual quantities of (i) an estimated 18,076 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of an estimated 2,710 net acres, and for the satisfaction of related uses, whichever of (i) or (ii) is less.

II

There was a failure to present to the Special Master or to the Court claims for and evidence of all the practicably irrigable acreage within the undisputed boundaries of the two Tribes' reservations, for which water rights then should have been allocated to them by the Decree herein of March 9, 1964. That land totals approximately 37,449 practicably irrigable acres within the Colorado River Indian Reservation and a number of practicably irrigable acres within the Cocopah Indian Reservation which is currently being computed and soon will be available for consideration.

The Cocopah Indian Tribe moves pursuant to Article IX of that Decree for entry of a Supplemental Decree or amendment of the original Decree adjudicating additional present perfected rights to the Cocopah Indian Tribe for such additional practicably irrigable acreage within its reservation.

The Colorado River Indian Tribes move pursuant to Article IX of that Decree for the entry of a Supplemental Decree or amendment to the original Decree adjudicating additional present perfected rights to the Colorado River Indian Tribes in the waters of the Colorado River in annual quantities not to exceed (i) 219,811 acre-feet of diversion from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 37,449 net acres, and for the satisfaction of related uses, whichever of (i) or (ii) is less.

WHEREFORE, individually and collectively, the Colorado River Indian Tribes and the Cocopah Indian Tribe respectfully pray that this Court:

1. Pursuant to Article II(D)(5) and Article IX of the original Decree entered March 9, 1964, determine and decree to the Tribes additional present perfected rights in

the waters of the Colorado River, as set forth in I and II above.

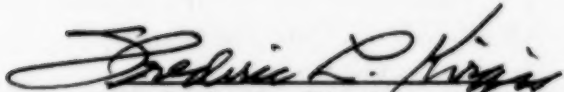
2. If the Court deems it desirable, appoint a Special Master to assist the Court in its determination of said additional present perfect rights.

Respectfully submitted,



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IN THE
Supreme Court of the United States

Supreme Court, U. S.
FILED

MAY 22 1978

MICHAEL ROBAK, JR., CLERK

October Term 1977
No. 8, Original of
October Term 1965

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Defendants,

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Interveners,

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Impleaded Defendants.

Response of the States of Arizona, California, and Nevada and the Other California Defendants to the Petition of Intervention and Brief in Support Thereof on Behalf of the Fort Mojave Tribe, the Quechan Tribe of the Fort Yuma Indian Reservation, the Chemehuevi Indian Tribe, the Colorado River Indian Tribes and the Confederation of Indian Tribes of the Colorado River and Joined by the National Congress of American Indians as Amicus Curiae.

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IN THE
Supreme Court of the United States

October Term 1977
No. 8, Original of
October Term 1965

STATE OF ARIZONA,

Complainant,

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CITY OF SAN DIEGO, and COUNTY OF SAN DIEGO,

Defendants,

UNITED STATES OF AMERICA and STATE OF NEVADA,

Interveners,

STATE OF NEW MEXICO and STATE OF UTAH,

Impleaded Defendants.

Response of the States of Arizona, California, and Nevada and the Other California Defendants to the Petition of Intervention and Brief in Support Thereof on Behalf of the Fort Mojave Tribe, the Quechan Tribe of the Fort Yuma Indian Reservation, the Chemehuevi Indian Tribe, the Colorado River Indian Tribes and the Confederation of Indian Tribes of the Colorado River and Joined by the National Congress of American Indians as Amicus Curiae.

STATE OF ARIZONA, Complainant, the California Defendants (STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CITY OF SAN DIEGO, COUNTY OF SAN DIEGO) and STATE OF NEVADA, Intervener (hereinafter referred to collectively as the "State parties"), hereby oppose the Petition of Intervention on Behalf of the Fort Mojave Indian Tribe, the Chemehuevi Indian Tribe, the Quechan Tribe of the Fort Yuma Indian Reservation, the Colorado River Indian Tribes, and the Confederation of Indian Tribes of the Colorado River, (hereinafter referred to as the "applicant Indian Tribes" or "applicants") and joined in by the National Congress of American Indians as Amicus Curiae. The State parties contend that the Petition of Intervention should be denied and that proceedings toward carrying out this Court's mandate under Article VI of the 1964 Decree in this matter should be allowed to continue between the existing parties.

ARGUMENT

The Petition of Intervention and Brief in Support are no more than a rehash of the Motion for Leave to Intervene as Indispensable Parties filed by largely the same group of applicants on December 23, 1977. The State parties opposed that motion in a Response dated January 25, 1978, and hereby incorporate by reference that response in its entirety as an answer to the Petition of Intervention and Brief in Support.

Nothing the applicants have alleged or argued in the present Petition in any way refutes the arguments already made by the State parties in opposing intervention, namely: (1) a grant of intervention would authorize a suit against the States of Arizona, California, and Nevada without their consent; and (2) neither the requirements for intervention as a matter of right nor for permissive intervention have been met.

The matter currently before the Court is the determination of present perfected rights under Article VI of the Court's 1964 Decree. As we have argued several times before, Article VI is not the proper vehicle for asserting additional Indian water rights claims above those already quantified in the Decree. Two other articles of the Decree, II(D)(5) and IX, are available for this purpose, and nothing proposed by the State parties under Article VI would preclude that availability. Furthermore, subordination language now agreed upon by the United States as well as the State Parties will protect Indian water rights against even the possi-

bility of prejudice by allegedly spurious water rights of major non-Indian claimants.

The applicants' only answer is to repeat their complaints about United States representation and their unlitigated claims, and then to blindly assert that the subordination language agreed upon by the United States for the protection of *their* water rights is meaningless because of ambiguities. As the State parties have argued in their earlier Response, the allegation of ambiguity is a sham. The fact that such an allegation is repeated, without support, in the present Petition indicates the disingenuousness of applicants' argument. Determined to prove that the United States has inadequately represented them, the applicants are apparently compelled to deny the obvious, namely that the United States managed to negotiate language very favorable to them in proceedings under an Article VI that is not even designed to address Indian claims. The fact is that the Indian Tribes will not be hurt, but only helped, by the Joint Motion for Entry of a Supplemental Decree which the United States and the States parties are just about to file under Article VI.

The Colorado River Indian Tribes and the Cocopah Indian Tribe have recognized this fact that the present applicants deny. In a motion dated April 10, 1978, they have moved to intervene not under Article VI, but rather under Articles II(D)(5) and/or IX, for purposes of asserting additional water rights claims. Furthermore, they approve and request entry of a Supplemental Decree under Article VI containing language

now agreed upon by the United States and the State parties. This is particularly significant because the Colorado River Indian Tribes have almost three-quarters of the total water rights quantified for Indian Tribes in the Court's Decree, and they are apparently satisfied that they are not being prejudiced by any of the proceedings under Article VI.¹

In sum, the State parties wholly reject the attempt by applicants to force their way into the final stages of implementing the Court's mandate under Article VI. All the parties to this lawsuit are now prepared to finally conclude fourteen years of work toward this end. Intervention by applicants would only destroy this work and could only be done under the guise of protecting rights already protected and/or litigating additional claims that should be and can effectively be litigated in proceedings under other articles of the Court's Decree.

¹It should be noted that the present Petition of Intervention filed by Raymond Simpson also lists the Colorado River Indian Tribes as a moving party. However, at a public meeting of the Colorado River Board of California, held April 19, 1978 in Los Angeles, Mr. Franklin McCabe, Jr., Chairman, Tribal Council, of the Colorado River Indian Tribes, stated that the Colorado River Indian Tribes had not joined in the motion made by Mr. Simpson's clients and had instructed him to remove their name from his pleadings. Mr. McCabe has since confirmed this in a letter to the Clerk of the Court, dated May 10, 1978.

Conclusion

For these reasons, as more completely detailed in the Response of the State parties dated January 25, 1978, the State parties urge that the Petition of Intervention and all relief prayed for therein be denied and that the existing parties be allowed to proceed to implement the mandate of Article VI.

Respectfully submitted,

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By **DOUGLAS B. NOBLE.**

Service of the within and receipt of a copy
thereof is hereby admitted this day
of May, A.D. 1978.



Supreme Court, U. S.

FILED

MAY 30 1978

MANUEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

October Term 1976

No. 8, Original of
October Term 1965

STATE OF ARIZONA,

Complainant,

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CITY OF SAN DIEGO, and COUNTY OF SAN DIEGO,

Defendants,

UNITED STATES OF AMERICA and STATE OF NEVADA,

Interveners,

STATE OF NEW MEXICO and STATE OF UTAH,

Impleaded Defendants.

**Joint Motion for the Entry of a Supplemental Decree;
Proposed Supplemental Decree; and Memorandum
in Support of Proposed Supplemental Decree**

(See list of attorneys on next page)

May 26, 1978

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RECEIVED

OCT 16 1978

OFFICE OF THE CLERK
SUPREME COURT, U.S.

October 11, 1978

Honorable Michael Rodak, Jr.
Clerk
Supreme Court of the United States
Washington, D.C. 20530

Re: No. 8, Original, O.T. 1978
Arizona v. California, et al.

Dear Mr. Rodak:

All parties signatory to the Joint Motion for the Entry of a Supplemental Decree, as filed in final form on May 26, 1978, concur that the Proposed Supplemental Decree set forth in that motion should be corrected in the following respects:

(1) At the bottom of page 5 of the said motion, the parathetical designation of a State after the name of each Indian Reservation should be deleted;

(2) At the end of the list of Reservations at the bottom of the said page, the following words should be added:

"Ft. Yuma 6.67"

Counsel for the Cocopah Indian Tribe and counsel for the Colorado River Tribes concur in this correction. Counsel of the Indians of the Ft. Mojave, Chemehuevi and Ft. Yuma Reservations, notified of the correction, have indicated no objection.

Accordingly, should the Court be minded to grant the Joint Motion, it would be appropriate to enter the Supplemental Decree with these corrections, and I will appreciate it if you will place this letter before the Court.

Sincerely,

Wade H. McCree, Jr.
Wade H. McCree, Jr.
Solicitor General

Attachment



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Defendants,

UNITED STATES OF AMERICA and STATE OF NEVADA,
Interveners,

STATE OF NEW MEXICO and STATE OF UTAH,
Impleaded Defendants.

Joint Motion for the Entry of a Supplemental Decree

The UNITED STATES OF AMERICA, Intervener, STATE OF ARIZONA, Complainant, the California Defendants (STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY

COUNTY WATER DISTRICT, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CITY OF SAN DIEGO, COUNTY OF SAN DIEGO) and STATE OF NEVADA, Intervener, respectfully move this Court to enter the Proposed Supplemental Decree submitted herewith, to which the above parties have agreed.

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STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CITY OF SAN DIEGO, and COUNTY OF SAN DIEGO,

Defendants,

UNITED STATES OF AMERICA and STATE OF NEVADA,

Interveners,

STATE OF NEW MEXICO and STATE OF UTAH,

Impleaded Defendants.

Proposed Supplemental Decree

The United States of America, Intervener, State of Arizona, Complainant, the California Defendants (State of California, Palo Verde Irrigation District, Imperial Irrigation District, Coachella Valley County Water District, The Metropolitan Water District of Southern California, City of Los Angeles, City of San Diego, County of San Diego), and State of Nevada, Intervener, pursuant to Article VI of the Decree entered in the case on March 9, 1964, at 376 U. S. 340, and amended

on February 28, 1966, at 383 U.S. 268, have agreed to the present perfected rights to the use of mainstream water in each State and their priority dates as set forth herein. Therefore, it is hereby ORDERED, ADJUDGED, AND DECREED that said present perfected rights in each State and their priority dates are determined to be as set forth below, subject to the following:

(1) The following listed present perfected rights relate to the quantity of water which may be used by each claimant and is not intended to limit or redefine the type of use otherwise set forth in said Decree.

(2) This determination shall in no way affect future adjustments resulting from determinations relating to settlement of Indian reservation boundaries referred to in Article II(D) (5) of said Decree.

(3) Article IX of said Decree is not affected by this list of present perfected rights.

(4) Any water right listed herein may only be exercised for beneficial uses.

(5) In the event of a determination of insufficient mainstream water to satisfy present perfected rights pursuant to Article II(B) (3) of said Decree, the Secretary of the Interior shall, before providing for the satisfaction of any of the other present perfected rights except for those listed herein as "MISCELLANEOUS PRESENT PERFECTED RIGHTS" (rights numbered 7-21 and 29-80 below) in the order of their priority dates without regard to State lines, first provide for the satisfaction in full of all rights of the

Chemehuevi Indian Reservation, Cocopah Indian Reservation, Fort Yuma Indian Reservation, Colorado River Indian Reservation, and the Fort Mojave Indian Reservation as set forth in Article II(D) (1)-(5) of said Decree, provided that the quantities fixed in paragraphs (1) through (5) of Article II(D) of said Decree shall continue to be subject to appropriate adjustment by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined. Additional present perfected rights so adjudicated by such adjustment shall be in annual quantities not to exceed the quantities of mainstream water necessary to supply the consumptive use required for irrigation of the practicably irrigable acres which are included within any area determined to be within a reservation by such final determination of a boundary and for the satisfaction of related uses. The quantities of diversions are to be computed by determining net practicably irrigable acres within each additional area using the methods set forth by the Special Master in this case in his Report to this Court dated December 5, 1960, and by applying the unit diversion quantities thereto, as listed below:

INDIAN RESERVATION	UNIT DIVERSION QUANTITY ACRE-FEET PER IRRIGABLE ACRE
Cocopah (Arizona)	6.37
Colorado River (California)	6.67
Chemehuevi (California)	5.97
Ft. Mojave (California)	6.46

The foregoing reference to a quantity of water necessary to supply consumptive use required for irrigation, and as that provision is included within paragraphs (1) through (5) of Article II(D) of said Decree, shall constitute the means of determining quantity of adjudicated water rights but shall not constitute a restriction of the usage of them to irrigation or other agricultural application. If all or part of the adjudicated water rights of any of the five Indian Reservations is used other than for irrigation or other agricultural application, the total consumptive use, as that term is defined in Article I(A) of said Decree, for said Reservation shall not exceed the consumptive use that would have resulted if the diversions listed in subparagraph (i) of paragraphs (1) through (5) of Article II(D) of said Decree and the equivalent portions of any supplement thereto had been used for irrigation of the number of acres specified for that Reservation in said paragraphs and supplement and for the satisfaction of related uses. Effect shall be given to this paragraph notwithstanding the priority dates of the present perfected rights as listed below. However, nothing in this paragraph (5) shall affect the order in which such rights listed below as "MISCELLANEOUS PRESENT PERFECTED RIGHTS" (numbered 7-21 and 29-80 below) shall be satisfied. Furthermore, nothing in this paragraph shall be construed to determine the order of satisfying any other Indian water rights claims not herein specified.

I

ARIZONA

A. Federal Establishments Present Perfected Rights

The federal establishments named in Article II, subdivision (D), paragraphs (2), (4) and (5), of the Decree entered March 9, 1964 in this case, such rights having been decreed in Article II:

Defined Area of Land	Annual Diversions (acre-feet) ¹	Net Acres ¹	Priority Date
1) Cocopah Indian Reservation	2,744	431	Sept. 27, 1917
2) Colorado River Indian Reservation	358,400 252,016 51,986	53,768 37,808 7,799	Mar. 3, 1865 Nov. 22, 1873 Nov. 16, 1874
3) Fort Mohave Indian Reservation	27,969 68,447	4,327 10,589	Sept. 18, 1890 Feb. 2, 1911

B. Water Projects Present Perfected Rights

- (4) *The Valley Division, Yuma Project* in annual quantities not to exceed (i) 254,200 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 43,562 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with a priority date of 1901.
- (5) *The Yuma Auxiliary Project, Unit B* in annual quantities not to exceed (i) 6,800 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 1,225 acres and for the satisfaction of related

¹The quantity of water in each instance is measured by (i) diversions or (ii) consumptive use required for irrigation of the respective acreage and for the satisfaction of related uses, whichever of (i) or (ii) is less.

uses, whichever of (i) or (ii) is less, with a priority date of July 8, 1905.

- (6) *The North Gila Valley Unit, Yuma Mesa Division, Gila Project* in annual quantities not to exceed (i) 24,500 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 4,030 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with a priority date of July 8, 1905.

C. Miscellaneous Present Perfected Rights

1. The following miscellaneous present perfected rights in Arizona in annual quantities of water not to exceed the listed acre-feet of diversion from the mainstream to supply the consumptive use required for irrigation and the satisfaction of related uses within the boundaries of the land described and with the priority dates listed:

<u>Defined Area of Land</u>	<u>Annual Diversions (acre-feet)</u>	<u>Priority Date</u>
7) 160 acres in Lots 21, 24, and 25, Sec. 29 and Lots 15, 16, 17 and 18, and the SW 1/4 of the SE1/4, Sec. 30, T.16S., R.22E., San Bernardino Base and Meridian, Yuma County, Arizona (Powers) ²	960	1915

²The names in parentheses following the description of the "Defined Area of Land" are used for identification of present perfected rights only; the name used is the first name appearing as the Claimants identified with a parcel in Arizona's 1967 list submitted to this Court.

<u>Defined Area of Land</u>	<u>Annual Diversions (acre-feet)</u>	<u>Priority Date</u>
8) Lots 11, 12, 13, 19, 20, 22 and S1/2 of SW1/4, Sec. 30, T.16S., R.22E., San Ber- nardino Base and Meridian, Yuma County, Arizona. (United States) ³	1,140	1915
9) 60 acres within Lot 2, Sec. 15 and Lots 1 and 2, Sec. 22, T.10N., R.19W, G&SRBM. (Graham) ²	360	1910
10) 180 acres within the N1/2 of the S1/2 and the S1/2 of the N1/2 of Sec. 13 and the SW1/4 of the NE1/4 of Sec. 14, T.18N., R.22W., G&SRBM. (Hulet) ²	1,080	1902
11) 45 acres within the NE1/4 of the SW1/4,) the SW1/4 of the SW1/4 and the SE1/4) of the SW1/4 of Sec. 11, T.18N., R.22W.,) G&SRBM.) 80 acres within the N1/2 of the SW1/4 of) Sec. 11, T.18N., R.22W., G&SRBM.) 10 acres within the NW1/4 of the NE1/4) of the NE1/4 of Sec. 15, T.18N., R.22W.,) G&SRBM.) 40 acres within the SE1/4 of the SE1/4) of Sec. 15, T.18N., R.22W., G&SRBM.) (Hurschler) ²)	1,050	1902
12) 40 acres within Sec. 13, T.17N., R.22W., G&SRBM. (Miller) ²	240	1902
13) 120 acres within Sec. 27, T.18N., R.21W.,) G&SRBM.) 15 acres within the NW1/4 of the NW) 1/4, Sec. 23, T.18N., R.22W., G&SRBM.) (McKellips and Granite Reef Farms) ⁴)	810	1902

³Included as a part of the Powers' claim in Arizona's 1967 list submitted to this Court. Subsequently, the United States and Powers agreed to a Stipulation of Settlement on land ownership whereby title to this property was quieted in favor of the United States.

⁴The names in parentheses following the description of the "Defined Area of Land" are the names of claimants, added since the 1967 list, upon whose water use these present perfected rights are predicated.

Defined Area of Land	Annual Diversions (acre-feet)	Priority Date
14) 180 acres within the NW1/4 of the NE1/4, the SW1/4 of the NE1/4, the NE1/4 of the SW1/4, the NW1/4 of the SE1/4, the NE1/4 of the SE1/4, and the SW1/4 of the SE1/4, and the SE1/4 of the SE1/4, Sec. 31, T.18N., R.21W., G&SRBM. (Sherrill & Lafollette) ⁴	1,080	1902
15) 53.89 acres as follows: Beginning at a point 995.1 feet easterly of the NW corner of the NE1/4 of Sec. 10, T.8S., R.22W., Gila and Salt River Base and Meridian; on the northerly boundary of the said NE1/4, which is the true point of beginning, then in a southerly direction to a point on the southerly boundary of the said NE1/4 which is 991.2 feet E. of the SW corner of said NE1/4 thence easterly along the S. line of the NE1/4, a distance of 807.3 feet to a point, thence N. 0°7' W., 768.8 feet to a point, thence E. 124.0 feet to a point, thence northerly 0°14' W., 1,067.6 feet to a point, thence E. 130 feet to a point, thence northerly 0°20' W., 405.2 feet to a point, thence northerly 63°10' W., 506.0 feet to a point, thence northerly 90° 15' W., 562.9 feet to a point on the north- erly boundary of the said NE1/4, thence easterly along the said northerly boundary of the said NE1/4, 116.6 feet to the true point of the beginning containing 53.89 acres. All as more particularly described and set forth in that survey executed by Thomas A. Yowell, Land Surveyor on June 24, 1969. (Molina) ⁴	318	1928
16) 60 acres within the NW1/4 of the NW1/4) and the north half of the SW1/4 of the) NW1/4 of Sec. 14, T.8S., R.22W.,) G&SRBM.) 70 acres within the S1/2 of the SW1/4 of) the SW1/4, and the W1/2 of the SW1/4,) Sec. 14, T.8S., R.22W., G&SRBM.) (Sturges) ⁴)	780	1925

Defined Area of Land	Annual Diversions (acre-feet)	Priority Date
17) 120 acres within the N1/2 NE1/4, NE1/4 NW1/4, Section 23, T.18N., R.22W., G& SRBM (Zozaya) ⁴	720	1912
18) 40 acres in the W1/2 of the NE1/4 of Sec- tion 30, and 60 acres in the W1/2 of the SE1/4 of Section 30, and 60 acres in the E1/2 of the NW1/4 of Section 31, com- prising a total of 160 acres all in Township 18 North, Range 21 West of the G&SRBM. (Swan) ⁴	960	1902
19) 7 acres in the East 300 feet of the W1/2 of Lot 1 (Lot 1, being the SE1/4 SE1/4, 40 acres more or less), Section 28, Town- ship 16 South, Range 22 East, San Bernar- dino Meridian, lying North of U.S. Bureau of Reclamation levee right of way. EX- CEPT that portion conveyed to the United States of America by instrument recorded in Docket 417, page 150 EXCEPTING any portion of the East 300 feet of W1/2 of Lot 1 within the natural bed of the Colo- rado River below the line of ordinary high water and also EXCEPTING any artificial accretions waterward of said line of or- dinary high water, all of which comprises approximately seven (7) acres (Milton and Jean Phillips) ⁴	42	1900

2. The following miscellaneous present perfected rights in Arizona in annual quantities of water not to exceed the listed number of acre-feet of (i) diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use, whichever of (i) or (ii) is less, for domestic, municipal, and industrial purposes within the boundaries of the land described and with the priority dates listed:

Defined Area of Land	Annual Diversions (acre-feet)	Annual Consumptive Use (acre-feet)	Priority Date
20) City of Parker ²	630	400	1905
21) City of Yuma ²	2,333	1,478	1893

II CALIFORNIA

A. Federal Establishments Present Perfected Rights

The federal establishments named in Article II, subdivision (D), paragraphs (1), (3), (4), and (5) of the Decree entered March 9, 1964 in this case such rights having been decreed by Article II:

<u>Defined Area of Land</u>	<u>Annual Diversions (acre-feet)⁵</u>	<u>Net Acres⁵</u>	<u>Priority Date</u>
22) Chemehuevi Indian Reservation	11,340	1,900	Feb. 2, 1907
23) Yuma Indian Reservation	51,616	7,743	Jan. 9, 1884
24) Colorado River Indian Reservation	10,745 40,241 3,760	1,612 6,037 564	Nov. 22, 1873 Nov. 16, 1874 May 15, 1876
25) Fort Mohave Indian Reservation	13,698	2,119	Sep. 18, 1890

B. Water Districts and Projects Present Perfected Rights

26)

The Palo Verde Irrigation District in annual quantities not to exceed (i) 219,780 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 33,604 acres and for the satisfaction of related uses, which-

⁵The quantity of water in each instance is measured by (i) diversions or (ii) consumptive use required for irrigation of the respective acreage and for satisfaction of related uses, whichever of (i) or (ii) is less.

ever of (i) or (ii) is less, with a priority date of 1877.

27)

The Imperial Irrigation District in annual quantities not to exceed (i) 2,600,000 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 424,145 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with a priority date of 1901.

28)

The Reservation Division, Yuma Project, California (non-Indian portion) in annual quantities not to exceed (i) 38,270 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 6,294 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with a priority date of July 8, 1905.

C. Miscellaneous Present Perfected Rights

1. The following miscellaneous present perfected rights in California in annual quantities of water not to exceed the listed number of acre-feet of diversions from the mainstream to supply the consumptive use required for irrigation and the satisfaction of related uses within the bound-

aries of the land described and with the priority dates listed:

<u>Defined Area of Land</u>	<u>Annual Diversions (acre-feet)</u>	<u>Priority Date</u>
29) 130 acres within Lots 1, 2, and 3, SE1/4 of NE1/4 of Section 27, T.16S., R.22E., S.B.B. & M. (Wavers) ⁶	780	1856
30) 40 acres within W1/2, W1/2 of E1/2 of Section 1, T.9N., R.22E., S.B.B. & M. (Stephenson) ⁶	240	1923
31) 20 acres within Lots 1 and 2, Sec. 19, T.13S., R.23E., and Lots 2, 3, and 4 of Sec. 24, T.13S., R.22E., S.B.B. & M. (Mendivil) ⁶	120	1893
32) 30 acres within NW1/4 of SE1/4, S1/2 of SE1/4, Sec. 24, and NW1/4 of NE1/4, Sec. 25, all in T.9S., R.21E., S.B.B. & M. (Grannis) ⁶	180	1928
33) 25 acres within Lot 6, Sec. 5; and Lots 1 and 2, SW1/4 of NE1/4, and NE1/4 of SE1/4 of Sec. 8, and Lots 1 & 2 of Sec. 9, all in T.13S., R.22E., S.B.B. & M. (Morgan) ⁶	150	1913
34) 18 acres within E1/2 of NW1/4 and W1/2 of NE1/4 of Sec. 14, T.10S., R.21E., S.B.B. & M. (Milpitas) ⁶	108	1918
35) 10 acres within N1/2 of NE1/4, SE1/4 of NE1/4, and NE1/4 of SE1/4, Sec. 30, T.9N., R.23E., S.B.B. & M. (Simons) ⁶	60	1889

⁶The names in parentheses following the description of the "Defined Area of Land" are used for identification of present perfected rights only; the name used is the first name appearing as the claimant identified with a parcel in California's 1967 list submitted to this Court.

<u>Defined Area of Land</u>	<u>Annual Diversions (acre-feet)</u>	<u>Priority Date</u>
36) 16 acres within E1/2 of NW1/4 and N1/2 of SW1/4, Sec. 12, T.9N., R.22E., S.B.B. & M. (Colo. R. Sportsmen's League) ⁶	96	1921
37) 11.5 acres within E1/2 of NW1/4, Sec. 1, T.10S., R.21E., S.B.B. & M. (Milpitas) ⁶	69	1914
38) 11 acres within S1/2 of SW1/4, Sec. 12, T.9N., R.22E., S.B.B. & M. (Andrade) ⁶	66	1921
39) 6 acres within Lots 2, 3, and 7 and NE1/4 of SW1/4, Sec. 19, T.9N., R.23E., S.B.B. & M. (Reynolds) ⁶	36	1904
40) 10 acres within N1/2 of NE1/4, SE1/4 of NE1/4 and NE1/4 of SE1/4, Sec. 24, T.9N., R.22E., S.B.B. & M. (Cooper) ⁶	60	1905
41) 20 acres within SW1/4 of SW1/4, (Lot 8) Sec. 19, T.9N., R.23E., S.B.B. & M. (Chagnon) ⁷	120	1925
42) 20 acres within NE1/4 of SW1/4, N1/2 of SE1/4, SE1/4 of SE1/4, Sec. 14, T.9S., R.21E., S.B.B. & M. (Lawrence) ⁷	120	1915

2. The following miscellaneous present perfected rights in California in annual quantities of water not to exceed the listed number of acre-feet of (i) diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use, whichever of (i)

⁷The names in parentheses following the description of the "Defined Area of Land" are the names of the homesteaders upon whose water use these present perfected rights, added since the 1967 list submitted to this Court, are predicated.

or (ii) is less, for domestic, municipal, and industrial purposes within the boundaries of the land described and with the priority dates listed:

Defined Area of Land	Annual Diversions (acre-feet)	Annual Consumptive Use (acre-feet)	Priority Date
43) City of Needles ⁶	1,500	950	1885
44) Portions of: Secs. 5, 6, 7 & 8, T.7N., R.24E.; Sec. 1, T.7N., R.23E.; Secs. 4, 5, 9, 10, 15, 22, 23, 25, 26, 35, & 36, T.8N., R.23E.; Secs. 19, 29, 30, 32 & 33, T.9N., R.23E., S.B.B. & M. (Atchison, Topeka and Santa Fe Railway Co.) ⁶	1,260	273	1896
45) Lots 1, 2, 3, 4, 5, & SW1/4 NW 1/4 of Sec. 5, T.13S., R.22E., S.B.B. & M. (Conger) ⁷	1.0	0.6	1921
46) Lots 1, 2, 3, 4 of Sec. 32, T.11S., R.22E., S.B.B. & M. (G. Draper) ⁷	1.0	0.6	1923
47) Lots 1, 2, 3, 4, and SE1/4 SW1/4 of Sec. 20, T.11S., R.22E., S.B.B. & M. (McDonough) ⁷	1.0	0.6	1919
48) SW1/4 of Sec. 25, T.8S., R.22E., S.B.B. & M. (Faubion) ⁷	1.0	0.6	1925
49) W1/2 NW1/4 of Sec. 12, T.9N., R.22E., S.B.B. & M. (Dudley) ⁷	1.0	0.6	1922
50) N1/2 SE1/4 and Lots 1 and 2 of Sec. 13, T.8S., R.22E., S.B.B. & M. (Douglas) ⁷	1.0	0.6	1916
51) N1/2 SW1/4, NW1/4 SE1/4, Lots 6 and 7, Sec. 5, T.9S., R.22E., S.B.B. & M. (Beauchamp) ⁷	1.0	0.6	1924
52) NE1/4 SE1/4, SE1/4 NE1/4, and Lot 1, Sec. 26, T.8S., R.22E., S.B.B. & M. (Clark) ⁷	1.0	0.6	1916

Defined Area of Land	Annual Diversions (acre-feet)	Annual Consumptive Use (acre-feet)	Priority Date
53) N1/2 SW1/4, NW1/4 SE1/4, SW1/4 NE1/4, Sec. 13, T.9S., R. 21E., S.B.B. & M. (Lawrence) ⁷	1.0	0.6	1915
54) N1/2 NE1/4, E1/2 NW1/4, Sec. 13, T.9S., R.21E., S.B.B. & M. (J. Graham) ⁷	1.0	0.6	1914
55) SE1/4, Sec. 1, T.9S., R.21E., S.B.B. & M. (Geiger) ⁷	1.0	0.6	1910
56) Fractional W1/2 of SW1/4 (Lot 6) Sec. 6, T.9S., R.22E., S.B.B. & M. (Schneider) ⁷	1.0	0.6	1917
57) Lot 1, Sec. 15; Lots 1 & 2, Sec. 14; Lots 1 & 2, Sec. 23; all in T.13S., R.22E., S.B.B. & M. (Martinez) ⁷	1.0	0.6	1895
58) NE1/4, Sec. 22, T.9S., R.21E., S.B.B. & M. (Earle) ⁷	1.0	0.6	1925
59) NE1/4 SE1/4, Sec. 22, T.9S., R.21E., S.B.B. & M. (Diehl) ⁷	1.0	0.6	1928
60) N1/2 NW1/4, N1/2 NE1/4, Sec. 23, T.9S., R.21E., S.B.B. & M. (Reid) ⁷	1.0	0.6	1912
61) W1/2 SW1/4, Sec. 23, T.9S., R.21E., S.B.B. & M. (Graham) ⁷	1.0	0.6	1916
62) S1/2 NW1/4, NE1/4 SW1/4, SW1/4 NE1/4, Sec. 23, T.9S., R.21E., S.B.B. & M. (Cate) ⁷	1.0	0.6	1919
63) SE1/4 NE1/4, N1/2 SE1/4, SE1/4 SE1/4, Sec. 23, T.9S., R.21E., S.B.B. & M. (McGee) ⁷	1.0	0.6	1924
64) SW1/4 SE1/4, SE1/4 SW1/4, Sec. 23, NE1/4 NW1/4, NW1/4 NE1/4, Sec. 26; all in T.9S., R.21E., S.B.B. & M. (Stallard) ⁷	1.0	0.6	1924

Defined Area of Land	Annual Diversions (acre-feet)	Annual Consumptive Use (acre-feet)	Priority Date
65) W1/2 SE1/4, SE1/4 SE1/4, Sec. 26, T.9S., R.21E., S.B.B. & M. (Randolph) ⁷	1.0	0.6	1926
66) E1/2 NE1/4, SW1/4 NE1/4, SE1/4 NW1/4, Sec. 26, T.9S., R.21E., S.B.B. & M. (Stallard) ⁷	1.0	0.6	1928
67) S1/2 SW1/4, Sec. 13, N1/2 NW1/4, Sec. 24; all in T.9S., R.21E., S.B.B. & M. (Keefe) ⁷	1.0	0.6	1926
68) SE1/4 NW1/4, NW1/4 SE1/4, Lots 2, 3 & 4, Sec. 25, T.13S., R.23E., S.B.B. & M. (C. Ferguson) ⁷	1.0	0.6	1903
69) Lots 4 & 7, Sec. 6; Lots 1 & 2, Sec. 7; all in T.14S., R.24E., S.B.B. & M. (W. Ferguson) ⁷	1.0	0.6	1903
70) SW1/4 SE1/4, Lots 2, 3, and 4, Sec. 24, T.12S., R.21E., Lot 2, Sec. 19, T.12S., R.22E., S.B.B. & M. (Vaulin) ⁷	1.0	0.6	1920
71) Lots 1, 2, 3 and 4, Sec. 25, T.12S., R.21E., S.B.B. & M. (Salisbury) ⁷	1.0	0.6	1920
72) Lots 2, 3, SE1/4 SE1/4, Sec. 15, NE1/4 NE1/4, Sec. 22; all in T.13S., R.22E., S.B.B. & M. (Hadlock) ⁷	1.0	0.6	1924
73) SW1/4 NE1/4, SE1/4 NW1/4, and Lots 7 & 8, Sec. 6, T.9S., R.22E., S.B.B. & M. (Streeter) ⁷	1.0	0.6	1903
74) Lot 4, Sec. 5; Lots 1 & 2, Sec. 7; Lots 1 & 2, Sec. 8; Lot 1, Sec. 18; all in T.12S., R.22E., S.B.B. & M. (J. Draper) ⁷	1.0	0.6	1903

<u>Defined Area of Land</u>	<u>Annual Diversions (acre-feet)</u>	<u>Annual Consumptive Use (acre-feet)</u>	<u>Priority Date</u>
75) SW1/4 NW1/4, Sec. 5; SE1/4 NE1/4 and Lot 9, Sec. 6; all in T.9S., R.22E., S.B.B. & M. (Fitz) [†]	1.0	0.6	1912
76) NW1/4 NE1/4, Sec. 26; Lots 2 & 3, W1/2 SE1/4, Sec. 23; all in T.8S., R.22E., S.B.B. & M. (Williams) [†]	1.0	0.6	1909
77) Lots 1, 2, 3, 4, & 5, Sec. 25, T.8S., R.22E., S.B.B. & M. (Estrada) [†]	1.0	0.6	1928
78) S1/2 NW1/4, Lot 1, frac. NE1/4 SW1/4, Sec. 25, T.9S., R.21E., S.B.B. & M. (Whittle) [†]	1.0	0.6	1925
79) N1/2 NW1/4, Sec. 25; S1/2 SW1/4, Sec. 24; all in T.9S., R.21E., S.B.B. & M. (Corington) [†]	1.0	0.6	1928
80) S1/2 NW1/4, N1/2 SW1/4, Sec. 24, T.9S., R.21E., S.B.B. & M. (Tolliver) [†]	1.0	0.6	1928

III
NEVADA.

A. Federal Establishments Present Perfected Rights.

The federal establishments named in Article II, subdivision (D), paragraphs (5) and (6) of the Decree entered on March 9, 1964 in this case, such rights having been decreed by Article II:

<u>Defined Area of Land</u>	<u>Annual Diversions (acre-feet)</u>	<u>Net Acres</u>	<u>Priority Date</u>
81) Fort Mohave Indian Reservation	12,534 ⁸	1,939 ⁸	Sept. 18, 1890
82) Lake Mead National Rec- reation Area (The Overton Area of Lake Mead N.R.A. provided in Executive Order 5105)	500	300 ⁹	May 3, 1929 ¹⁰

⁸The quantity of water in each instance is measured by (i) diversions or (ii) consumptive use required for irrigation of the respective acreage and for satisfaction of related uses, whichever of (i) or (ii) is less.

⁹Refers to acre-feet of annual consumptive use, not to net acres.

¹⁰Article II(D)(6) of said Decree specifies a priority date of March 3, 1929. Executive Order 5105 is dated May 3, 1929, (see C.F.R. 1964 Cumulative Pocket Supplement, page 276, and the Findings of Fact and Conclusions of Law of the Special Master's Report in this case, pages 294-295).

IN THE

Supreme Court of the United States

October Term 1976

No. 8, Original of
October Term 1965

STATE OF ARIZONA,

Complainant,

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CITY OF SAN DIEGO, and COUNTY OF SAN DIEGO,

Defendants,

UNITED STATES OF AMERICA and STATE OF NEVADA,

Interveners,

STATE OF NEW MEXICO and STATE OF UTAH,

Impleaded Defendants.

Memorandum in Support of the Joint Motion for the Entry of the Proposed Supplemental Decree

This action was commenced in 1952, the opinion in the case was issued in 1963, 373 U.S. 546, and the Decree was entered in 1964, 376 U.S. 340, and amended on February 28, 1966, 383 U.S. 268. Article VI of the Decree, as amended, provides (383 U.S. at 268-269):

Within three years from the date of this decree [March 9, 1964], the States of Arizona, Cali-

fornea, and Nevada shall furnish to this Court and to the Secretary of the Interior a list of the present perfected rights, with their claimed priority dates, in waters of the mainstream within each state, respectively, in terms of consumptive use, except those relating to federal establishments. Any named party to this proceeding may present its claim of present perfected rights or its opposition to the claims of others. The Secretary of the Interior shall supply similar information, within a similar period of time, with respect to the claims of the United States to present perfected rights within each state. If the parties and the Secretary of the Interior are unable at that time to agree on the present perfected rights to the use of mainstream water in each state, and their priority dates, any party may apply to the Court for the determination of such rights by the Court.

Pursuant to Article VI, in March of 1967, the State of Arizona, the State of California, and the Secretary of the Interior submitted the lists required by that Article to the Court.¹ The parties were unable to reach agreement, although negotiations continued for nearly 10 years. Accordingly, on May 2, 1977, Arizona, Nevada, California, and seven California public agencies² (the State Parties) filed a Joint Motion for a Determination of Present Perfected Rights and the Entry of a Supplemental Decree pursuant to Article

¹The State of Nevada, Intervener, asserted no present perfected rights.

²Palo Verde Irrigation District, Imperial Irrigation District, Coachella Valley County Water District, The Metropolitan Water District of Southern California, City of Los Angeles, City of San Diego, and County of San Diego.

VI, accompanied by a Proposed Supplemental Decree reach agreement, although negotiations continued for setting forth the present perfected rights claimed by the parties, as well as a provision according priority to the present perfected rights of the Cocopah, Colorado River, Chemehuevi, Quechan (Fort Yuma), and Fort Mojave Tribes.³ In November 1977, the United States filed its Response to the Joint Motion urging the Court to enter the Proposed Supplemental Decree, provided that it were amended in several respects. The Court requested that the State Parties reply to the United States' Response, and negotiations continued.

The United States and the State Parties⁴ have now reached agreement on a Proposed Supplemental Decree which includes a provision giving the Indians present perfected rights priority and lists the present perfected rights with their claimed priority dates, in waters of the mainstream within each state, respectively, in terms of consumptive use. Accordingly, no further issues remain to be determined pursuant to Article VI. Nevertheless, in order to avoid future controversies, the moving parties apply to the Court for the entry of the Proposed Supplemental Decree submitted herewith, which embodies their agreement.

Dated: May 26, 1978.

Respectfully submitted,

³We note that some of these tribes have moved to intervene and it would, accordingly, seem right to defer action on the present Joint Motion until the question of any such intervention is resolved.

⁴The States of New Mexico and Utah, the impleaded defendants, claim no present perfected rights and are not parties to this Motion.

United States of America,
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Solicitor General,

By WADE H. MCCREE, JR.,

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Deputy County Counsel,

By **JOSEPH KASE, JR.,**

State of Nevada,

ROBERT LIST,

Attorney General,

LYLE RIVERA,

Chief Deputy Attorney General,

BRIAN MCKAY,

Deputy Attorney General,

By **LYLE RIVERA.**

Service of the within and receipt of a copy
thereof is hereby admitted this day
of May, A.D. 1978.

No. 8, Original

Supreme Court, U. S.
FILED
MAY 31 1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

STATE OF ARIZONA, COMPLAINANT

v.

STATE OF CALIFORNIA, ET AL.

ON MOTIONS FOR LEAVE TO INTERVENE

MEMORANDUM FOR THE UNITED STATES

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.



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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 8, Original

STATE OF ARIZONA, COMPLAINANT

v.

STATE OF CALIFORNIA, ET AL.

ON MOTIONS FOR LEAVE TO INTERVENE

MEMORANDUM FOR THE UNITED STATES

I. INTRODUCTION

The United States originally intervened in this action in December 1953 “as trustee for the Indians and Indian Tribes” claiming “on their behalf rights to the use of water from the Colorado River and its tributaries in the Lower Basin” (Petition of Intervention, ¶ 27). As this Court’s opinion demonstrates, the United States successfully contended that the five lower Colorado River tribes—the Fort Mohave Tribe, Quechon Tribe of the Fort Yuma Reservation, Chemehuevi Indian Tribe, Cocopah Indian Tribe, and the

Colorado River Indian Tribes—were entitled to substantial reserved water rights. See *Arizona v. California*, 373 U.S. 546, 595-601. The decree entered in 1964 allotted more than 900,000 acre-feet to the tribes annually. *Arizona v. California*, 376 U.S. 340, 344-345.

Now each of these tribes seeks to intervene.¹ On December 23, 1977, three of the tribes, the Fort Mojave Tribe, the Chemehuevi Tribe, and the Quechon Tribe ("the Three Tribes"), filed a motion for leave to intervene (Pet. 2). The United States filed a Memorandum in Opposition on February 17, 1978. However, the Three Tribes' motion was not accompanied by a petition in intervention (see Rule 9 of this Court and Rule 24(c), Fed. R. Civ. P.), and on February 23, 1978, the Court directed the Three Tribes to file their proposed petition in intervention, and requested the response of the United States and the other parties (*ibid.*). On April 7, 1978, the Three Tribes filed their proposed petition in intervention. On April 10, 1978, the two remaining tribes, the Cocopah Tribe and the Colorado River Indian Tribes ("the Two Tribes"), filed a separate motion for leave to intervene accompanied by a petition in intervention.

¹ The Confederation of Indian Tribes of the Colorado River also joins in the petition for intervention. The petition identifies (Pet. 1-2 n.2) the Confederation as a non-profit corporation organized pursuant to California law "through which the Tribes function." Since the petition states (*ibid.*) that the Confederation makes no claims to present perfected rights, no ground for its intervention has been established.

A closely related matter also pending before the Court is a joint motion filed in May 1977 by Arizona, Nevada, California, and seven California public agencies ("the State parties") seeking a determination of the non-Indian present perfected rights pursuant to Article VI of this Court's 1964 decree, 376 U.S. 340, 351-352, as amended, 383 U.S. 268. The supplemental decree proposed by the State parties listed the priority date and amount of the non-Indian present perfected rights claimed by the various parties, and included a provision giving Indian present perfected rights priority without regard to date of perfection. The objections the United States raised in its November 1977 response to the supplemental decree as first proposed in the joint motion have now been resolved, and on May 30, 1978 all affected parties² moved the Court for the entry of an agreed upon supplemental decree. Again, the non-Indian present perfected rights are listed and there is a more generous provision stipulating that the Indian present perfected rights shall have priority over all major non-Indian perfected

² By letter of March 14, 1978, the Attorney General of Utah advised the Court that Utah had no comment on the proposed supplemental decree, which does not affect Utah's rights to water from Colorado River tributaries. No comment has been received from New Mexico, whose rights as an Upper Basin state are unaffected by the proposed decree.

³ The proposed supplemental decree does not subordinate a limited category of so-called "miscellaneous" present perfected rights to the rights of the Tribes. Those rights total only 17,504 acre-feet of diversions, part of which are for municipal and industrial purposes. Most of those rights, when considered individually, are minimal and not all are senior to the tribal rights (February 1978 Memorandum in Opposition, p. 12 n.6).

rights³ without regard to date of priority when there is a shortage of mainstream water.⁴

II. INTERVENTION TO OPPOSE THE ENTRY OF SUPPLEMENTAL DECREE

The Three Tribes' opposition to the entry of the proposed supplemental decree is the primary ground for their motion for leave to intervene. The Three Tribes contend that the United States' acceptance of the proposed supplemental decree demonstrates the gross inadequacy of its representation of their interests (Motion, pp. 6-17; Pet. of Intervention, pp. 1-13).⁵ The United States' Memorandum in Opposition to the Three Tribes' motion, filed in February 1978, fully responds to these contentions, and demonstrates that the Three Tribes' objections to the proposed supplemental decree neither establish the inadequacy of the United States' representation of the tribal inter-

⁴ The proposed decree also eliminates any possible controversy over the use of tribal rights for other than agricultural purposes.

⁵ The Three Tribes' petition repeats their allegation that the government's conduct of all stages of this litigation has been tainted by a pervasive conflict of interest (Pet. 3-4, 22-23). They rely in part on a new affidavit (Pet. App. B) by the same Bureau of Indian Affairs employee whose prior affidavit was quoted in the initial brief of the Three Tribes. That view, like the documents cited in the initial motion and brief, does not represent the position of the Department of the Interior. See our February 1978 Memorandum in Opposition, p. 4 n. 2.

ests nor justify the Three Tribes' intervention.⁶ We respectfully refer the Court's attention to that memorandum, to which we adhere.

III. INTERVENTION TO PRESENT NON-ARTICLE VI CLAIMS REGARDING BOUNDARY DISPUTES AND OMITTED LANDS

The Two Tribes' Motion for Leave to Intervene, in contrast, is not grounded on objections to the proposed supplemental decree. To the contrary, their motion states (Motion, p. 2) that the Cocopah and Colorado River Indian Tribes "approve and request the entry of a Supplemental Decree" as proposed in the United States' February 1978 response to the State parties.

The Two Tribes seek to intervene to raise matters which they recognize do "not fall within the scope of the procedure set forth in Article VI of the Decree and the disposition of the pending Joint Motion [for the entry of the proposed supplemental decree]" (Motion, p. 6), but which, they urge, should be considered contemporaneously (*id.* at 10). First, the Two Tribes seek (*id.* at 5-9) to raise claims for additional present perfected water rights for lands that have been finally determined to be within the boundaries of their res-

⁶ We note that after the completion of the Special Master's reports, the Navajo Tribe sought leave to intervene, and the United States opposed this motion in November 1971 on the grounds, *inter alia*, that our representation of the Navajo tribal interests had been adequate and that their motion was untimely. The Court denied the motion without opinion. *Arizona v. California*, 368 U.S. 17, reconsideration denied, 368 U.S. 950.

ervations since the entry of this Court's decree. Article II(D)(5) of that decree provided that the quantity of water to which the tribes were entitled should be "subject to appropriate adjustment by agreement or decree of this Court in the event that boundaries of the respective reservations are finally determined." 376 U.S. at 345.⁷ Second, the Two Tribes also seek to intervene in order to raise claims for lands within their reservations for which the United States "for reasons unknown to the two Tribes * * * failed or declined to present [claims] to the Special Master or to the Court" (Motion, p. 9).

Similar claims also form a second basis for the Three Tribes' Motion for Leave to Intervene (Motion, pp. 9-16).

Contrary to the Three Tribes' arguments, claims resulting from the resolution of boundary disputes and claims for "omitted" lands, *i.e.*, those for which no evidence was submitted to the Special Master, would not be affected or foreclosed by the entry of the proposed supplemental decree, which is limited to the issues involving Article VI of the Court's original decree. The Two Tribes expressly seek relief pur-

⁷ Article II(D)(5) expressly refers only to boundary disputes regarding the Fort Mohave Indian Reservation and Colorado River Indian Reservation, because disputes regarding these reservations were known to exist at the time of the decree. Subsequently similar disputes involving other reservations have come to light, and the tribes contend that rights for these boundary dispute areas should be decreed under Article IX. See the discussion at pp. 5-6 of the Two Tribes' Motion for Leave to Intervene.

suant to Articles II(D)(5) and IX of this Court's decree (Motion, pp. 5-9), and the relief sought by the Three Tribes would also be under those provisions, not Article VI. Paragraphs 2 and 3 of the proposed decree state:

(2) This determination shall in no way affect future adjustments resulting from determinations relating to settlement of Indian reservation boundaries referred to in Article II(D)(5) of said Decree.

(3) Article IX of said decree is not affected by the list of present perfected rights.

Although the claims regarding boundary disputes and omitted lands will not be foreclosed or affected by the instant proceedings, the tribes contend that their claims are now sufficiently mature and precise to be presented to the Court, and the Two Tribes note (Motion, p. 11) that they "might even be fairly criticized if they failed now to present their claims to the Court and deliberately waited to do so until after consideration of the Joint Motion." They urge that until all their rights are finally determined their "losses inure annually to the benefit of others whose interests are subordinate, but who utilize water to which the Two Tribes would be entitled if their rights were perfected" thereby creating "a dependency which will influence and inflame opposition to the Two Tribes' subsequent efforts to perfect [those] rights" (Motion, p. 3). Accordingly, the Two Tribes assert that presentation of their claims now is essential.

ing their objection to the proposed supplemental decree is a similar contention that the water rights for boundary dispute areas and omitted lands are now ripe and should be resolved immediately.

IV. THE UNITED STATES' POSITION ON THE BOUNDARY DISPUTES AND OMITTED LANDS

As noted in our February 1978 memorandum in opposition to the Three Tribes' motion (Memorandum in Opposition, p. 9), the United States agrees with the tribes that water rights must ultimately be determined for areas recognized as a part of tribal reservations as a result of the resolution of boundary disputes since the filing of the original decree. As also stated in that memorandum (*ibid.*), the United States intended to file a motion with the Court seeking a determination of these rights in the future, but it is not prepared to do so at the present time. We have not yet completed our review of matters including soil classification, hydrology, and agricultural engineering, and accordingly cannot yet quantify the rights we would assert on behalf of the tribes. In addition, as the Colorado River Indian Tribes themselves acknowledge (Motion, p. 11, n.*), two boundary disputes involving their reservation have not yet been finally resolved.

With regard to the claims of the tribes for lands recognized as within the reservation at the time of the proceedings before the Special Master but for which no claims were asserted (omitted lands), the Department of the Interior has not yet determined

whether it would recommend that the United States should assert any claims on behalf of the tribes, and further study of hydrological and technical data will be necessary before such a determination will be made.

The claims of the tribes themselves for omitted lands are not yet finally formulated. The Cocopah Tribe states (Motion, p. 9) that it is not presently able to specify the number of practicably irrigable acres for which it will assert a claim, although it adds that these figures are now being computed. Appendix C to the Three Tribes' proposed petition in intervention, which sets for their claims for both boundary disputes and omitted lands, also states that the figures supplied "are the most exact that are available," and notes that there is "possible overlapping" (Pet. App. C-1, footnote).

The presentation of claims for water for boundary dispute areas and for omitted lands will begin a new phase of these proceedings. The tribes' prompt effort to raise the boundary dispute matters stands in clear contrast to the Three Tribes' untimely effort to intervene to oppose the proposed supplemental decree in order to challenge non-Indian claims for present perfected rights more than ten years after these claims were first filed with the Court in 1967, and after more than 13 years of negotiations by all parties on this subject. In our view, the tribes' present effort to intervene to assert claims for boundary dispute areas is clearly timely—indeed the nub of the disagreement between the tribes and the United States on this matter is the tribes' dissatisfaction with the United

States' failure to date to complete its preparations to raise these claims.

Accordingly, although we continue to oppose the motion of the Three Tribes to Intervene in order to object to the entry of the proposed supplemental decree under Article VI, we view the tribes' efforts to intervene to raise new non-Article VI matters as standing on a different footing. We do not believe that our representation of the tribes' interests has been inadequate, nor do we believe there is a conflict of interest. Nevertheless, we recognize that the tribes do not agree with our judgment of the degree of preparation necessary before the assertion of their boundary dispute claims (and the speed at which these preparations can be completed). We also recognize that the tribes believe that it is not in their interest to delay the assertion of their claims to omitted lands until the United States determines whether it would raise such claims on their behalf. Therefore, if the Court concludes that the claims the tribes seek to present are sufficiently matured and definite to be entertained at present,⁸ we would not oppose the tribes' intervention to present these claims after the current Article VI proceedings have been

⁸ Should the Court conclude that it would not entertain these claims until the remaining boundary disputes are finally resolved and the claims of each tribe quantified (see pp. 8-9, *supra*), we would continue our efforts to review and develop these claims on behalf of the tribes. In such circumstances, if the tribes considered the claims and supporting evidence eventually developed by the United States to be satisfactory, there might be no need for intervention.

concluded by the entry of the proposed supplemental decree. Cf. *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463, 473-474; *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, and cases cited at 370-372.

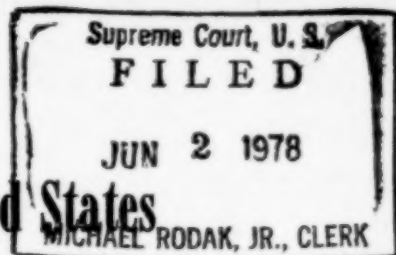
Should intervention be permitted, our inclination would be to continue to support the tribes' efforts to obtain a declaration of the water rights to which they are entitled. But, of course, the degree and character of continued participation by the United States must depend on our assessment of the proceedings as they develop.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

MAY 1978.

IN THE
Supreme Court of the United States



October Term 1977
No. 8, Original of
October Term 1965

STATE OF ARIZONA,

Complainant,

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CITY OF SAN DIEGO, and COUNTY OF SAN DIEGO,

Defendants,

UNITED STATES OF AMERICA and STATE OF NEVADA,

Interveners,

STATE OF NEW MEXICO and STATE OF UTAH,

Impleaded Defendants.

Response of the States of California and Nevada, the Coachella Valley County Water District, and the Imperial Irrigation District to the Motion of the Colorado River Indian Tribes and the Cocopah Indian Tribe for Leave to Intervene

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STATE OF CALIFORNIA, COACHELLA VALLEY COUNTY WATER DISTRICT, IMPERIAL IRRIGATION DISTRICT, Defendants, and STATE OF NEVADA, Intervener (hereinafter referred to as the "Responding Parties"), hereby respond to the Motion of the Colorado River Indian Tribes and the Cocopah Indian Tribe (hereinafter referred to as the "Applicant Tribes") for Leave to Intervene, dated April 10, 1978.

ARGUMENT

I

A Grant of Intervention Would Authorize a Suit by the Applicant Indian Tribes Against the States of Arizona, California, and Nevada and Therefore Requires Their Consent

States of the Union are immune from suit in the federal courts without their consent except where that immunity has been surrendered by the adoption of the Constitution of the United States. There has been such a surrender of immunity by the states with respect to original actions in the Supreme Court only (1) by one state against another and (2) by the United States against a state. (*Principality of Monaco v. Mississippi* (1934) 292 U.S. 313; *Duhne v. New Jersey* (1920) 251 U.S. 311; *Smith v. Reeves* (1900) 178 U.S. 436; *Hans v. Louisiana* (1890) 134 U.S. 1.)

Since there has been no such surrender of immunity with respect to suits against a state by individual Indians or by Indian tribes, the sovereign immunity of the states extends to suits by Indian tribes. (*United States v. Minnesota* (1926) 270 U.S. 181, 193; *Cherokee Nation v. Georgia* (1831) 30 U.S. (5 Pet.) 1; cf. *Skokomish Indian Tribe v. France* (9th Cir. 1959) 269 F.2d 555, 560-562.)

The Cocopah Indian Reservation is located in Arizona. Such immunity exists as against the Cocopah Indian Tribe whether it is regarded as a citizen of Arizona or not. If it is regarded as a citizen of the State of Arizona, this Court is without jurisdiction

to entertain its suit against Arizona because the judicial power of the federal courts does not extend to a suit brought against a state without its consent by its own citizens. (*Hans v. Louisiana* (1890) 134 U.S. 1.) It would also be barred from suit against the States of California and Nevada by the Eleventh Amendment of the Constitution, which provides that "the Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state . . ." (See *Ford Motor Co. v. Treasury Department* (1945) 323 U.S. 459, 464.) On the other hand, if the Cocopah Tribe is not regarded as being a citizen of any state, then it may not prosecute a suit against Arizona, California, or Nevada because the "States of the Union, still possessing attributes of sovereignty, . . . [are] immune from suits, without their consent, save where there has been 'a surrender of this immunity in the plan of the'" Constitution. (*Principality of Monaco v. Mississippi, supra*, 292 U.S. 313, 322-323) (quoting from The Federalist No. 81 (Hamilton).) No such surrender has been made respecting suits in the federal courts by Indian Tribes.

The same rules bar suit without state consent by the Colorado River Indian Tribes even though the Colorado River Indian Reservation is located in both Arizona and California. If the Colorado River Indian Tribes are deemed citizens of no state, then they may not sue any of the three states under the *Principality of Monaco* rule. If they are deemed citizens of both Arizona and California, they may not sue either state under the *Hans* rule and may not sue Nevada under the Eleventh Amendment and *Ford Motor* rule. If

they are deemed citizens of either Arizona or California, but not both, they may not sue the state of which they are citizens under *Hans* and may not sue the states (Nevada and either Arizona or California) of which they are not citizens under the Eleventh Amendment and *Ford Motor* rule.

It is clear that intervention by the applicant Indian Tribes would constitute a suit against the States of Arizona, California, and Nevada. Whether or not a suit is one against a state is not to be determined by formalities of the law of parties but by the actual effect a judgment in favor of the applicants would have against the states. "[T]he nature of a suit as one against the state is to be determined by the essential nature and effect of the proceeding. *Ex Parte Ayers*, 123 U.S. 443, 490-99; *Ex Parte New York*, 256 U.S. 490, 500; *Worcester County Trust Co. v. Riley*, 302 U.S. 292, 296-98." (*Ford Motor Co. v. Treasury Department*, *supra*, 323 U.S. 459, 464.)

The Applicant Tribes claim additional present perfected rights above those quantified in the 1964 Decree (376 U.S. 340) in this matter. In so doing, they seek a judgment that would be contrary to the interests of all three states. All of the additional claims are for present perfected rights to the use of water in either Arizona or California. These claims are contrary to the interest *parens patriae* of Nevada since in times of extreme shortage, there would be more, high priority claims for use of water in the other two states. Similarly, those additional claims for use of water in Arizona are contrary to the interest of California, and those for use of water in California are contrary to the interest of Arizona.

It is clear that the Applicant Tribes seek a judgment that would be contrary to the respective interests of Arizona, California, and Nevada. The intervention sought would therefore constitute a suit against those states and would require their consent.

II

The Responding Parties Are Willing to Accede to the Position of the United States on the Question of Intervention; if the United States Supports (or Does Not Oppose) Intervention, the States of California and Nevada Will Consent and the Other Responding Parties Not Oppose, but Only Subject to Certain Reservations and Conditions

The States of California and Nevada have already declined to consent to, and the other Responding Parties have opposed, intervention by the Chemehuevi, Fort Mojave, and Quechan Indian Tribes. (See Responses of the Arizona, California, and Nevada parties, dated January 25, 1978 and May 22, 1978.) The attempts to intervene filed on behalf of these three Tribes (hereinafter referred to as the "Fort Mojave pleadings") are totally inappropriate and legally unsound.

The Fort Mojave pleadings seek intervention in proceedings under Article VI of the Court's Decree and assertion therein of additional water rights claims of the Tribes. However, Article VI is not only the wrong vehicle for asserting such claims, but proceedings to implement its mandate had been underway for fourteen years before the Tribes ever sought to intervene. The Fort Mojave pleadings seek to destroy the Proposed Supplemental Decree resulting from those fourteen years of effort and now agreed upon by the United States

as well as the Arizona, California, and Nevada parties.¹ The Proposed Supplemental Decree does not prejudice any presently quantified or potential water rights of the five Lower Colorado River Indian Tribes and, in fact, confers a legal benefit on such rights by means of subordination language. Nevertheless, the Fort Mojave pleadings attack it. As a result, the opposition of the Responding Parties to the Fort Mojave pleadings has been and remains unequivocal.

By contrast, the Motion of the Colorado River and Cocopah Indian Tribes seeks to assert additional Indian water rights claims by means of the appropriate vehicles, Articles II (D)(5) and IX of the Court's Decree. The Applicant Tribes seek to initiate proceedings under these Articles, not to intervene in proceedings long underway. Furthermore, they do not attack the Proposed Supplemental Decree for implementing Article VI, but support its entry by the Court and distinguish the Article VI proceedings from those designed to assert additional Indian claims under Article II (D) (5) and IX.

The Applicant Tribes assert, as do the Fort Mojave pleadings, two types of claims to additional water rights: (1) claims that quantification of irrigable acreage within reservation boundaries existing as of the 1964 Decree was incorrect; and (2) claims to water rights associated with enlarged reservation boundaries that have been recognized since 1964. The Responding Parties continue to contend that the former type of claims are barred by *res judicata* since they were fully litigated

¹A Joint Motion for Entry of a Supplemental Decree, the Proposed Supplemental Decree, and a Memorandum in Support, dated May 26, 1978, were filed with the Court by the United States and the Arizona, California, and Nevada parties.

by competent counsel and quantified by the Court in the 1964 Decree. Nevertheless, if such recalculation of irrigable acreage were appropriate, Article IX would be the proper vehicle.

Thus, the Applicant Tribes are seeking to assert their claims through the proper Articles of the Decree and apart from the proceedings under Article VI that do not prejudice them. The question, nevertheless, is whether the Applicant Tribes should be allowed to intervene, with private counsel, to assert these claims or whether the United States should continue to represent them with the ability to assert the claims under the same Articles of the Decree.

If the Applicant Tribes are allowed to intervene, such intervention must be permissive and not as a matter of right. Rule 24(a) of the Federal Rules of Civil Procedure (FRCP)² imposes four requirements for intervention as a matter of right, one of which is that the applicants must show that their interest is not adequately represented by an existing party. The Responding Parties contend that the Applicant Tribes cannot meet this requirement. In discussing the adequacy of United States representation, the Responding Parties cannot presume to know the legal judgments, strategy, and tactics used by the United States

²The Supreme Court Rules do not address intervention, but Rule 9 applies to matters of original jurisdiction, such as this lawsuit. Section 2 of Rule 9 provides:

“The form of pleadings and motions in original actions shall be governed, so far as may be, by the Federal Rules of Civil Procedure, and in other respects those rules, where their application is appropriate, may be taken as a guide to procedure in original actions in this court.”

Rule 24 of the FRCP concerns intervention, and there would seem to be nothing in this action which would render inappropriate its application to Applicant Tribes' motion.

in representing the Applicant Tribes' interest. The Responding Parties can, however, attest to the general conduct of the litigation and to the results of that conduct.

Throughout this lawsuit, the United States has strongly espoused the Indian Tribes' interest. The Court's 1963 Opinion (373 U.S. 546) and 1964 Decree (376 U.S. 340) reflected this advocacy in a decision considered favorable to the Tribes. The Court reaffirmed the *Winters* doctrine of reserved water rights and awarded the five Lower Colorado River Indian Tribes water rights to approximately 900,000 acre-feet of annual diversions, even though much of this quantity had never been put to use.

In the post-1964 developments under Article VI of the Decree, the United States has continuously taken positions in support of the interest of the Tribes. The Proposed Supplemental Decree finally agreed upon by the United States and the Arizona, California, and Nevada parties is testimony to the adequacy of United States representation. A subordination agreement included therein allows presently quantified and potential water rights of the Tribes to be satisfied ahead of all major, non-Indian claims in time of water shortage.

In sum, the Responding Parties do not agree with the Applicant Tribes that the United States representation has been inadequate in the past. Furthermore, we have no reason to believe that United States representation will be inadequate in the future or that any conflict of interest exists that would render it so. We believe that the United States could and would adequately represent the Applicant Tribes as to additional water rights claims. Therefore, intervention as a matter of right does not lie.

If intervention is granted, it must be permissive intervention, and pursuant to Federal Rules of Civil Procedure 24(b), must not cause undue delay or prejudice. First, if intervention were to cause any delay in entry by the Court of the Proposed Supplemental Decree under Article VI, that delay would be undue and prejudicial. Now that the United States and the Arizona, California, and Nevada parties have agreed upon and filed a Proposed Supplemental Decree with the Court, there is no reason to delay its entry. Many present perfected rights claimants, especially those without contracts for water with the Secretary of the Interior, are anxiously awaiting court recognition of their claims. Furthermore, the Applicant Tribes approve the Proposed Supplemental Decree and request its entry (Applicant Tribes' Motion, p. 2). While the pendency of proceedings under Article VI should be no bar to assertion of claims under other Articles, similarly, that assertion should not bar the conclusion of proceedings under Article VI.

Second, intervention could also cause prejudice unless it is granted only for limited purposes. The Applicant Tribes seek to intervene for purposes of asserting additional Indian claims under Articles II (D)(5) and IX, and if intervention is granted, it should be so limited. The Responding Parties have no reason to doubt the good faith of the Applicant Tribes but recognize that unlimited intervention, particularly under Article IX, could be used not only to assert additional Indian claims but also to attack other, previously quantified claims, or other parts of the Decree, to the prejudice of the existing parties.

Finally, intervention could cause undue delay and prejudice if it resulted in multiple legal representation

of the Applicant Tribes. If intervention is denied, then the United States would continue to represent the Applicant Tribes as trustee and would have the sole and determining voice in speaking for their interests. However, if intervention is allowed and the Applicant Tribes are represented by private counsel, then the possibility exists that the United States, still a party in the case, might also attempt to speak for the Applicant Tribes. In the view of the Responding Parties, such a situation would cause confusion and undue delay and might well prejudice any attempts to resolve whatever disputes arise short of full litigation. We believe that we are entitled to know who speaks for and legally commits the Applicant Tribes and that each Tribe, if a party to the suit, should have but one voice, just like the other parties. We believe that if intervention is granted, undue delay and prejudice can be avoided only if each Tribe is represented by private counsel and not also by the United States.

The Responding Parties believe that permissive intervention could be conditioned in such a way as to resolve the aforementioned problems and prevent undue delay or prejudice. Because of this and because the Applicant Tribes are attempting to assert their additional claims under appropriate Articles of the Decree, we do not necessarily oppose intervention. Rather, we believe that the United States, as trustee for the Applicant Tribes, is in the best position to make that decision, and subject to certain reservations and conditions, we will accede to that decision, whatever it may be.

However, the Responding Parties do have one major reservation. As noted earlier, we do not believe that United States representation of the Applicant Tribes has been inadequate in the past or that any conflict

of interest exists that could render it inadequate in the future. Therefore, we would not accede to United States support of intervention based on such an assertion. On the other hand, we have doubts as to whether the United States, as trustee for the Applicant Tribes, can, in effect, delegate away its duty to act as their counsel in the absence of a conflict of interest.

Under the traditional law of trusts, the trustee owes the beneficiary (here the Tribes) the duty not to delegate to others the performance of acts in the administration of the trust which the trustee ought personally to perform. See *Scott on Trusts*, Third Edition, section 171, p. 1388. In general, those acts requiring skill or judgment must be exercised by the trustee personally. See Bogert, *Law of Trusts*, 5th Edition, section 92, p. 331. In this regard, legal representation of Indian Tribes by the United States is an aspect of the plenary power of the United States to manage the affairs of Indians and Indian Tribes. *Worcester v. Georgia* (1832) 6 Pet. 515; *United States v. Kagama* (1886) 118 U.S. 375; *United States v. Ramsey* (1926) 271 U.S. 467. This Court has recognized the complete control of the United States over Indian litigation and the underlying duty of Congress to protect Indians under its care:

“There can be no more complete representation than on the part of the United States in acting on behalf of these dependents—whom Congress, with respect to the restricted lands, has not yet released from tutelage. Its efficacy does not depend upon the Indian’s acquiescence. It does not rest upon convention, nor is it circumscribed by rules which govern private relations. It is a representa-

tion which traces its source to the plenary control of Congress in legislating for protection of the Indians under its care, and it recognizes no limitations that are inconsistent with the discharge of the national duty." *Heckman v. United States* (1912) 224 U.S. 413, 444-445.

It therefore seems that legal representation of Indian Tribes may not be delegable without action of Congress. We recognize, however, that the relationship between the United States and all Indian Tribes is a unique one, and the Court may determine that assent of the United States to Indian intervention and private representation would not violate the United States' fiduciary duty.

Therefore, assuming that the United States asserts no conflict of interest, but, as trustee, can and does support (or does not oppose) intervention, then the States of California and Nevada will consent to intervention and the other Responding Parties will not oppose it, but only on the following three conditions, designed to prevent undue delay and prejudice:

- 1) that the Proposed Supplemental Decree to implement the mandate of Article VI, offered in the Joint Motion of the United States and the Arizona, California, and Nevada parties, dated May 26, 1978, be entered forthwith or not later than concurrently with the grant of intervention;

- 2) that intervention be granted to the Cocopah and Colorado River Indian Tribes for the limited purpose of asserting additional water rights claims under Articles II (D)(5) and/or IX and not for any other purpose or under any other Article of the 1964 Decree;

3) that private counsel for each intervening Tribe be designated as the only counsel for said Tribe as to the limited purpose for which intervention is granted; that the United States not be allowed to concurrently represent or speak for said Tribe as to such limited purpose.

On the other hand, if the United States opposes intervention, then the Responding Parties will do likewise and the States of California and Nevada will not consent. In such case, however, the Responding Parties believe that it would be appropriate for the Court to accept Amicus Curiae briefs from the Applicant Tribes in support of their claims in whatever proceedings might be initiated by existing parties to the suit.

Conclusion

In closing, the Responding Parties want to emphasize that their position in this Response in no way alters their unequivocal opposition to the unreasonable and inappropriate intervention attempts of the Fort Mojave pleadings. The present Motion for Leave to Intervene of the Cocopah and Colorado River Indian Tribes, however, is a significantly different approach to the problem of additional Indian claims and has thus elicited from the Responding Parties a significantly different response.

If intervention is granted, the Responding Parties request at least an additional ninety (90) days to reply to the Petition of Intervention.

DATED: June 1, 1978.

Respectfully submitted,

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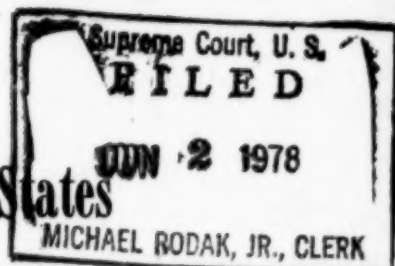
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Service of the within and receipt of a copy
thereof is hereby admitted this day
of June, A.D. 1978.



IN THE
Supreme Court of the United States



October Term 1977
No. 8, Original of
October Term 1965

STATE OF ARIZONA,

Complainant,

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CITY OF SAN DIEGO, and COUNTY OF SAN DIEGO,

Defendants,

UNITED STATES OF AMERICA and STATE OF NEVADA,
Interveners,

STATE OF NEW MEXICO and STATE OF UTAH,
Impleaded Defendants.

Response of the Metropolitan Water District of Southern California, City of Los Angeles, City of San Diego, and County of San Diego to the Motion of the Colorado River Indian Tribes and the Cocopah Indian Tribe for Leave to Intervene and Petition of Intervention.

(See list of attorneys on next page)

June 1, 1978

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Defendants,

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Impleaded Defendants.

Response of the Metropolitan Water District of Southern California, City of Los Angeles, City of San Diego, and County of San Diego to the Motion of the Colorado River Indian Tribes and the Cocopah Indian Tribe for Leave to Intervene and Petition of Intervention.

Introduction.

The Metropolitan Water District of Southern California (hereinafter referred to as "Metropolitan") is a public agency established pursuant to the Metropolitan Water District Act (Cal. Stats. 1969, Chapter 209, as amended). Metropolitan is engaged in the development, storage and delivery of water at wholesale for its 27 member public agencies, consisting of fourteen (14) cities, twelve (12) Municipal Water Districts, and a County Water Authority. The member public agencies are all located in Southern California, extending into the six counties of Los Angeles, Orange, Riverside, San Bernardino, San Diego and Ventura. The population of Metropolitan's service area is nearly 11 million, approximately one-half the population of the State of California. There are two sources from which water is obtained by Metropolitan for distribution through its system to its member agencies. Metropolitan's primary source is water taken from the Colorado River pursuant to contract with the Secretary of the Interior. This water is delivered through the Colorado River Aqueduct, constructed and owned by Metropolitan. Water is also received from northern California pursuant to contract with the State of California through its Department of Water Resources which operates the California State Water Project.

The City of Los Angeles, the City of San Diego and the County of San Diego, all political subdivisions of the State of California, receive substantial water through the facilities of Metropolitan. Along with Metropolitan each is a party in this case and will be referred to hereinafter as "the Urban Agencies."

The Urban Agencies file this response independently of the response filed by the State of California, State of Nevada, Coachella Valley County Water District, and Imperial Irrigation District. However, the Urban Agencies adopt and incorporate by reference that response. In addition to the issues raised in the said response, the Urban Agencies challenge Indian claims of increased water rights based upon (1) additional irrigable acreage within the undisputed reservation boundaries and (2) additional irrigable acreage resulting from alleged boundary changes.

In the eventuality that all the Indian Tribes along the Lower Colorado River who have petitioned to intervene, with the exception of the Cocopah Tribe whose claim is totally within Arizona, prevail in their claims for increased irrigable acreage, said increase may result in an Indian consumptive use entitlement to Colorado River water exceeding the water rights allocated to the reservations in the 1964 Decree by approximately 237,860 acre-feet. Because of Metropolitan's priority position in the 1931 intra-state Seven-Party Water Agreement, this increased Indian entitlement to Colorado River water will potentially reduce Metropolitan's allocation of Colorado River water by approximately twenty (20) percent. In addition, in time of severe shortage the Cocopah water right claim would further diminish Metropolitan's Colorado River water supply.

The Urban Agencies oppose redetermination of the issue of the amount of irrigable acreage within the undisputed boundaries of all the Indian Tribes. However, the Urban Agencies believe it is proper and

timely for this Court to determine the reservation boundary issues raised by all the Tribes seeking intervention.

ARGUMENT.

I

The Urban Agencies Oppose All Claims to Additional Water Rights Asserted by the Colorado River Indian Tribes and the Cocopah Indian Tribe.

The claims to additional water rights asserted by the Colorado River Indian Tribes and the Cocopah Indian Tribe (hereinafter referred to as the "two Tribes") are based on two grounds: (1) that determination of irrigable acreage within their reservation boundaries as recognized in the 1964 Decree in *Arizona v. California* was incorrect; and (2) that the alleged resolution of certain reservation boundary disputes since 1964 has resulted in increased irrigable acreage.

Relying upon a stipulated judgment in *Cocopah Tribe of Indians v. Rogers C.B. Morton* dated May 12, 1975, the motion asserts a right of the Cocopah Tribe to 883.53 acres of land located in Arizona of which 780 acres are alleged to be practicably irrigable with a right of diversion from the mainstream of 4,969 acre-feet. This claim is in addition to the water rights awarded to the Tribe in the 1964 Decree in *Arizona v. California*.

The Colorado River Indian Reservation claim to 4,439 additional irrigable acres located in California resulting in an additional consumptive use right of approximately 9,037 acre-feet is based on an order of the Secretary of the Interior issued on January 17, 1969. This claim is in addition to the irrigable acreage used as the basis for the water rights awarded to the Tribe in the 1964 Decree.

The Urban Agencies oppose all contentions that the above referenced judgment and Secretarial Order finally determined the disputed reservation boundaries. The Urban Agencies were not parties to any court proceeding adjudicating Cocopah reservation boundaries and therefore have never had their day in court on the boundary issue. The Secretarial Order is functional for Department of the Interior administrative purposes only, but cannot be considered binding for the purpose of establishing a claim for a federally reserved water right which will directly infringe on Metropolitan's water rights.

Additionally, the two Tribes claim increased water rights based on alleged incorrect determination of irrigable acreage within the undisputed reservation boundaries recognized in the 1964 Decree. The two Tribes allege that a redetermination may add approximately 37,449 irrigable acres within the Colorado River Indian Reservation resulting in an approximate additional consumptive use right of 124,892 acre-feet of water. The motion also refers to a number of additional practicably irrigable acres within the Cocopah Indian Reservation which allegedly is presently being computed.

The Urban Agencies oppose all assertions that the two Tribes are entitled to additional water rights due to an alleged improper determination of irrigable acreage within reservation boundaries. The issue of the amount of irrigable acres within the undisputed boundaries of the two Tribes' reservations was fully tried by the Special Master and this Court in *Arizona v. California* and the Tribes were competently represented throughout by the United States. The Urban Agencies

contend that the doctrine of *res judicata* bars relitigation of the number of irrigable acres within the conceded boundaries.

II

The Urban Agencies Oppose All Claims to Additional Water Rights Asserted by the Chemehuevi, Quechan, and Fort Mojave Tribes.

Although technically this is a response to the motion of the Colorado River and Cocopah Indian Tribes to intervene, the Urban Agencies note that identical issues concerning claims of water rights based upon alleged additional irrigable acreage are sought to be raised by the petition for leave to intervene of the Chemehuevi, Quechan and Fort Mojave Tribes.¹ The Urban Agencies have opposed that motion on the ground that it was improperly brought under Article VI of the 1964 Decree dealing only with non-Indian present perfected rights. We believe, however, that the questions of additional Indian water rights of the Chemehuevi, Quechan and Fort Mojave Tribes based upon alleged reservation boundary changes should be adjudicated by this Court along with those reservation boundary issues presented by the Colorado River and Cocopah Indian Tribes. The Chemehuevi, Quechan, and Fort

¹We note that the Colorado River Indian Tribes were named as parties in the petition for intervention filed on April 7, 1978 by attorney Raymond C. Simpson and are also named as parties in the separate motion for leave to intervene filed on April 10, 1978 by attorneys Frederic L. Kergis and Terry Noble Fiske. In a letter to the Court dated May 10, 1978, the Colorado River Indian Tribes informed the Court that they did not join in the April 7, 1978 petition. Therefore, for purposes of clarity we have regarded the Colorado River Indian Tribes as represented by attorneys Kergis and Fiske and treated the motion of April 10, 1978 as setting forth their legal position in these proceedings.

Mojave Tribes, like the Colorado River Indian Tribes and the Cocopah Indian Tribe, assert additional water rights based on two grounds: (1) that determination of irrigable acreage within the undisputed reservation boundaries recognized in the 1964 Decree was incorrect; and (2) that alleged resolution of reservation boundary disputes since 1964 has resulted in increased irrigable acreage.

The Chemehuevi claim to additional irrigable acreage within California is based on two grounds. First, that the determination of irrigable acreage within the undisputed reservation boundaries recognized in its 1964 Decree is erroneous and that the Tribe is entitled to an additional consumptive right of approximately 7,067 acre-feet; second, that two Orders by the Secretary of the Interior with respect to reservation boundaries have resulted in increased irrigable acreage—thereby increasing the Tribe's entitlement to water by approximately 448 acre-feet.

The Quechan claim to additional irrigable acreage is based on assertions that the interpretation of relevant agreements and statutes which established the boundaries of the Fort Yuma reservation and formed the basis for determination of water rights decreed to the reservation in the Court's 1964 Decree was erroneous. The Quechan claim to additional water rights, found in "Appendix C" contained in the April 7, 1978, Petition of Intervention of the Fort Mojave, the Quechan, and the Chemehuevi Tribes is for an approximate consumptive use right of 59,350 acre-feet of water.

The Fort Mojave Indian Reservation claim to additional irrigable acreage is based in part on a memorandum signed by Secretary of the Interior Rogers

C.B. Morton on June 3, 1974, approving a revised boundary for the Hay and Wood Reserve of the Fort Mojave Indian Reservation which substantially enlarges the size of that reservation. Pursuant to Appendix C, the total Fort Mojave claim to additional irrigable acreage results in an additional consumptive use right of 41,400 acre-feet of water.

The Urban Agencies object to all assertions by the Chemehuevi, Quechan and Fort Mojave Tribes that the referenced boundary disputes have been finally determined. The Secretarial Orders, as stated above, are functional for Department of the Interior administrative purposes, but cannot be considered binding for the purpose of establishing a claim for a federally reserved water right.

The Urban Agencies reiterate their position that the determination of the irrigable acreage within the undisputed reservation boundaries recognized in its 1964 Decree bars relitigation of that matter.

III

The Urban Agencies Do Not Oppose Permissive Intervention of the Two Tribes Solely for the Purpose of Litigating Additional Water Rights Based Upon Alleged Expansion of Reservation Boundaries.

In their motion dated April 10, 1978, the two Tribes properly raise their claims to additional water rights under Articles II(D)(5) and IX of the 1964 Decree.

The Urban Agencies, as signatories on the joint response of the state parties (dated January 25, 1978) to the motion for leave to intervene by the Fort Mojave Indian Tribe, the Chemehuevi Indian Tribe and the Quechan Tribe, took the position that Article

VI is not the appropriate vehicle for asserting additional Indian water rights because Article VI deals only with non-Indian water rights.

The Urban Agencies concur with the two Tribes on the propriety of resolving at this time their claims to additional water rights based upon alleged reservation boundary expansion. The Urban Agencies are also in favor of resolving at this time the claims of the Chemehuevi, Quechan, and Fort Mojave Tribes to additional water rights based upon alleged reservation boundary expansion. It is therefore respectfully requested that the Court appoint a Special Master to adjudicate all of the above referenced boundary disputes under Articles II(D)(5) and IX of the 1964 Decree.

Two of the referenced boundary disputes, those on the Fort Mojave and Colorado River Indian Reservations, were tried before and adjudicated by the Special Master in the earlier proceedings. However, in its 1968 decision the Court declined to resolve those boundary disputes at that time on the ground that they were not ripe for decision. The subsequent Secretarial Orders and court judgments relied on by the Tribes determined the disputed boundaries contrary to the result previously reached by the Special Master. Further, the motion for leave to intervene filed on behalf of the Chemehuevi, Quechan and Fort Mojave Tribes asserts that portions of the lands within some of the disputed areas are presently being irrigated or are being developed for irrigation by the Tribes on the assumption that certain of the disputed boundaries have been "finally determined." The Urban Agencies disagree with that assumption but agree with the Tribes that these boundary disputes are now ripe for adjudication.

The Urban Agencies believe, however, that the boundary adjudications and corresponding water rights determinations should be made independently of the proceeding for approval of the Joint Motion for Entry of a Supplemental Decree under Article VI. The proceedings to implement Article VI's mandate had been underway for fourteen years before the Chemehuevi, Quechan, and Fort Mojave Tribes ever sought to intervene. These pleadings seek to destroy the Proposed Supplemental Decree resulting from those fourteen years of effort and now agreed upon by the United States as well as the Arizona, California, and Nevada parties. The Proposed Supplemental Decree does not prejudice any of the existing or potential water rights of the five Lower Colorado River Indian Tribes and, in fact, it confers a legal benefit by means of subordination provisions which permit the Indians to have their quantified water rights satisfied before any major non-Indian present perfected rights are satisfied. This is so even though some of the major non-Indian present perfected rights would have earlier priority dates than those of the Indian rights.

The Urban Agencies do not agree with the two Tribes that the United States representation of them has been inadequate in the past or that any conflict of interest exists on the part of the United States which would prevent adequate representation of the Tribes in the future. The United States has always vigorously asserted the Indian position, and the Urban

Agencies have no reason to doubt that the United States will forcefully assert additional Indian water rights claims under Articles II(D)(5) and/or IX.

The Urban Agencies, nevertheless, do not oppose permissive intervention provided that (1) the entry of the Joint Motion for Entry of a Supplemental Decree under Article VI is not delayed pending the outcome of proceedings initiated under Articles II(D)(5) and/or IX and (2) if the two Tribes are allowed to intervene with independent counsel, such independent counsel be designated as the only counsel for the two Tribes and that the United States not be allowed to concurrently represent the Tribes as trustee.

Conclusion.

The Urban Agencies do not oppose permissive intervention of the two Tribes for the purpose of litigating additional water rights based upon the alleged expansion of reservation boundaries, and believe a Special Master should be appointed to hear those claims together with the similar boundary claims asserted by the Chemehuevi, Quechan, and Fort Mojave Indian Tribes.

Such intervention should not be permitted to delay or otherwise interfere with this Court's approval of the Proposed Supplemental Decree under Article VI pertaining to non-Indian water rights.

If intervention is granted, the Urban Agencies request at least an additional ninety (90) days to reply to the petition of intervention.

Dated: June 1, 1978.

Respectfully submitted,

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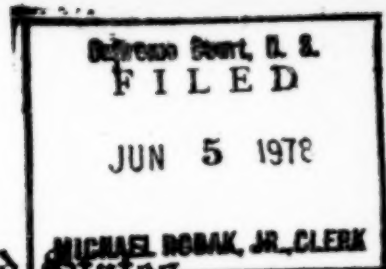
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Service of the within and receipt of a copy
thereof is hereby admitted this day
of June, A.D. 1978.

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In the
Supreme Court of the United States

October Term 1977
No. 8, Original of
October Term 1965

STATE OF ARIZONA,

Complainant,

v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION
DISTRICT, IMPERIAL IRRIGATION DISTRICT, COA-
CHELLA VALLEY COUNTY WATER DISTRICT, THE
METROPOLITAN WATER DISTRICT OF SOUTHERN
CALIFORNIA, CITY OF LOS ANGELES, CITY OF SAN
DIEGO, and COUNTY OF SAN DIEGO,

Defendants,

UNITED STATES OF AMERICA and STATE OF NEVADA,

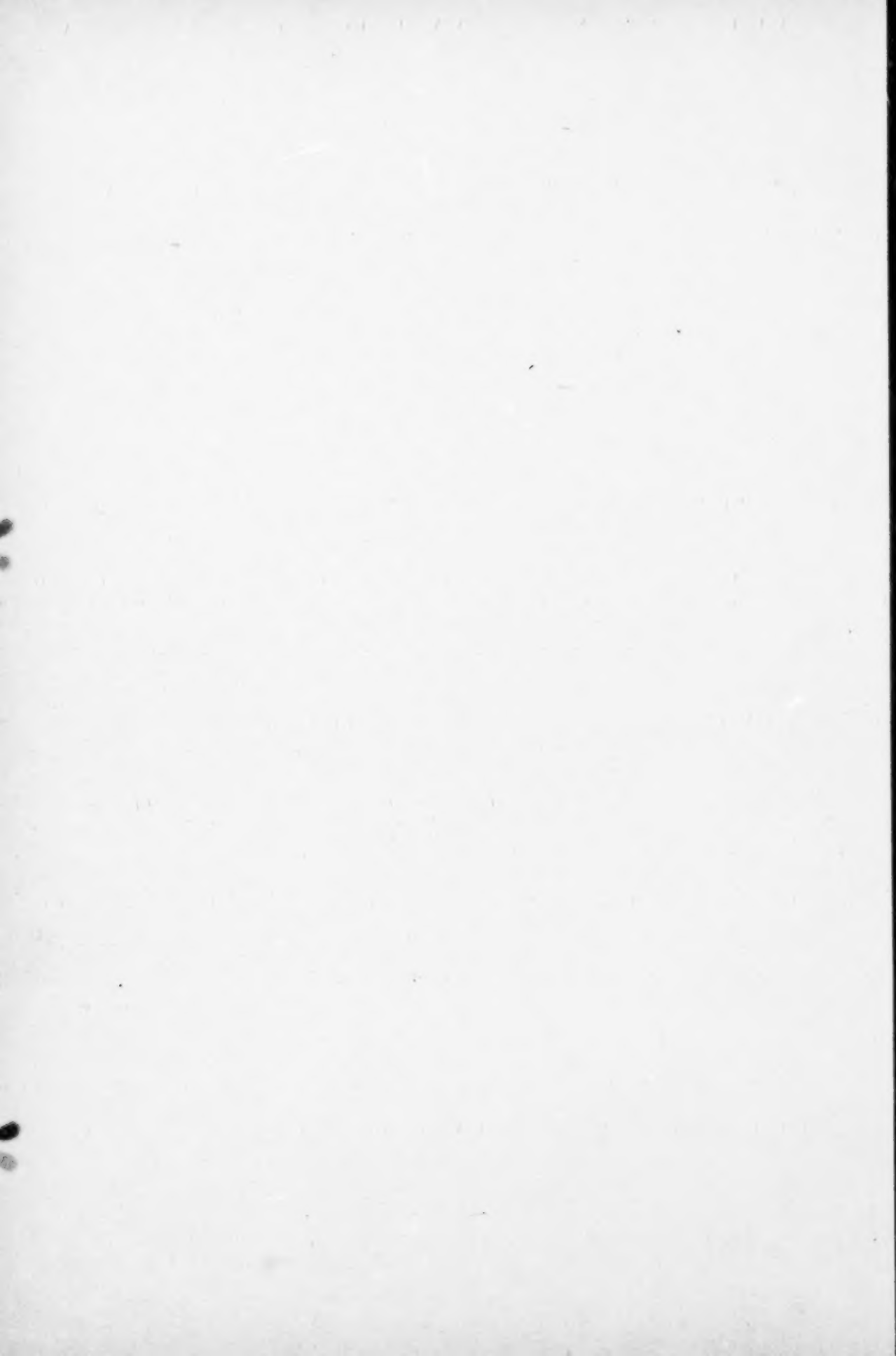
Intervenors,

STATE OF NEW MEXICO and STATE OF UTAH,

Impleaded Defendants.

RESPONSE OF THE STATE OF ARIZONA TO THE
MOTION OF THE COLORADO RIVER INDIAN TRIBES
AND THE COCOPAH INDIAN TRIBE FOR LEAVE TO
INTERVENE AND PETITION OF INTERVENTION.

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In the
Supreme Court of the United States

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STATE OF ARIZONA,

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v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CITY OF SAN DIEGO, and COUNTY OF SAN DIEGO,

Defendants,

UNITED STATES OF AMERICA and STATE OF NEVADA,

Intervenors,

STATE OF NEW MEXICO and STATE OF UTAH,

Impleaded Defendants.

RESPONSE OF THE STATE OF ARIZONA TO THE MOTION OF THE COLORADO RIVER INDIAN TRIBES AND THE COCOPAH INDIAN TRIBE FOR LEAVE TO INTERVENE AND PETITION OF INTERVENTION.

THE STATE OF ARIZONA (hereinafter referred to as the "State of Arizona" or "Arizona") hereby responds to the

Motion of the Colorado River Indian Tribes and the Cocopah Indian Tribe (hereinafter referred to as the "Applicant Tribes") for Leave to Intervene, dated April 10, 1978.

I

ADOPTION OF THE RESPONSE OF THE STATES OF CALIFORNIA AND NEVADA, THE COACHELLA VALLEY COUNTY WATER DISTRICT, AND THE IMPERIAL IRRIGATION DISTRICT TO THE MOTION OF THE APPLICANT TRIBES TO INTERVENE

The State of Arizona concurs with and adopts the response filed by the States of California and Nevada, and the Coachella Valley County Water District and the Imperial Irrigation District to the Motion for Leave to Intervene by the Applicant Tribes, except as hereinafter expressly stated.

Arizona cannot concur in the position of the States of California, Nevada, the Coachella Valley County Water District and the Imperial Irrigation District, wherein these responding parties indicate that they would consent to intervention.

The State of Arizona concurs that a State is immune from suit in the Federal Courts without its consent. It further concurs in the position that this State, together with the other mentioned respondents to this Motion, have declined to consent to and oppose intervention by the Chemehuevi, Fort Mojave and Quechan Indian Tribes. The State of Arizona concurs that the intervention by the Applicant Tribes must be permissive and not as a matter of right.

II

ARIZONA'S POSITION RELATIVE TO INTERVENTION

It is the position of the State of Arizona that in all proceedings before this Court, in the subject litigation, the United States representation of the Applicant Tribes has been adequate and zealous. It, therefore, does not seem necessary or justified for the Court to allow intervention by the Applicant Tribes through private counsel. Seeing no reasonable justification for the claim that the Applicant Tribes have not been adequately represented by the United States, as Trustee for the Applicant Tribes, Arizona cannot accede to a position which would automatically grant its consent to this intervention in the event that the United States did not support or at least did not oppose intervention.

As to the portion of the response filed by the States of California and Nevada, the Coachella Valley Water District and the Imperial Irrigation District, which states that those respondents will consent to intervention or at least not oppose intervention, the State of Arizona cannot concur.

The State of Arizona would further direct the Court's attention to the fact that in large part the claims sought to be asserted by the applicant tribes depend for their validity upon the determination of land title disputes. The original jurisdiction of this Court was not sought to determine land title disputes. Once the land title disputes have been finalized in lower court decisions then the Court can, through Articles II(D)(5) and (9) of the Decree, make such other orders as are just relative to water rights which may pertain to any additional land the Applicant Tribes may acquire. After a final adjudication of the land title disputes, the United

States may then present to this Court for its consideration the water rights which may pertain to such land.

The State of Arizona feels that an orderly way for the Applicant Tribes to proceed is to first finalize all claims they wish to make for new land and then through the United States seek from this Court through Article II(D)(5) and (9) of the Decree entered by this Court an appropriate order. For these reasons the State of Arizona does not consent to intervention by these tribes at this time even though Article II(D)(5) and (9) would be an appropriate vehicle for the United States to assert any additional claims to water which these tribes feel are just.

In the event that the Court feels intervention to be appropriate, the State of Arizona would strongly urge that the three conditions, indicated in the response of the States of California, Nevada, Coachella Valley County Water District and the Imperial Irrigation District, be imposed to prevent delay and prejudice.

Arizona feels that whatever the Court decides to do on the Applicant Tribes' Motion, that no reason exists to delay the entry of a Supplemental Decree by this Court to implement Article VI of the Decree entered May 9, 1964. The proposed Supplemental Decree not only protects Indian claims to Present Perfected Rights, but confers benefits to the Applicant Tribes and the Fort Mojave Indian Tribe, the Chemehuevi Indian Tribe and the Quechan Tribe of the Fort Yuma Indian Reservations.

CONCLUSION

The State of Arizona concurs in the responding briefs filed by the States of California and Nevada and the

Coachella Valley County Water District and the Imperial Irrigation District, except that it does not consent to intervention in the event that the United States determines that it will support or not oppose intervention. It further urges that this Court should determine any applicable water rights which may apply to additional lands acquired by the Applicant Tribes after final adjudication of land title disputes has been achieved.

If intervention is granted, the responding party requests at least an additional 90 days to reply to the Petition of Intervention.

DATED this 5th day of June, 1978.

STATE OF ARIZONA

By Ralph E. Hunsaker
Chief Counsel,
Arizona Water Commission

No. 8, Original

Supreme Court, U. S.
FILED
JUN 9 1976
MICHAEL RORAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

STATE OF ARIZONA, COMPLAINANT

v.

STATE OF CALIFORNIA, ET AL.

ON MOTIONS FOR LEAVE TO INTERVENE

MEMORANDUM FOR THE UNITED STATES

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.



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ON MOTIONS FOR LEAVE TO INTERVENE

MEMORANDUM FOR THE UNITED STATES

I. INTRODUCTION

The United States originally intervened in this action in December 1953 "as trustee for the Indians and Indian Tribes" claiming "on their behalf rights to the use of water from the Colorado River and its tributaries in the Lower Basin" (Petition of Intervention, ¶ 27). As this Court's opinion demonstrates, the United States successfully contended that the five lower Colorado River tribes—the Fort Mohave Tribe, Quechon Tribe of the Fort Yuma Reservation, Chemehuevi Indian Tribe, Cocopah Indian Tribe, and the

Colorado River Indian Tribes—were entitled to substantial reserved water rights. See *Arizona v. California*, 373 U.S. 546, 595-601. The decree entered in 1964 allotted more than 900,000 acre-feet to the tribes annually. *Arizona v. California*, 376 U.S. 340, 344-345.

Now each of these tribes seeks to intervene.¹ On December 23, 1977, three of the tribes, the Fort Mojave Tribe, the Chemehuevi Tribe, and the Quechon Tribe ("the Three Tribes"), filed a motion for leave to intervene (Pet. 2). The United States filed a Memorandum in Opposition on February 17, 1978. However, the Three Tribes' motion was not accompanied by a petition in intervention (see Rule 9 of this Court and Rule 24(c), Fed. R. Civ. P.), and on February 23, 1978, the Court directed the Three Tribes to file their proposed petition in intervention, and requested the response of the United States and the other parties (*ibid.*). On April 7, 1978, the Three Tribes filed their proposed petition in intervention. On April 10, 1978, the two remaining tribes, the Cocopah Tribe and the Colorado River Indian Tribes ("the Two Tribes"), filed a separate motion for leave to intervene accompanied by a petition in intervention.

¹ The Confederation of Indian Tribes of the Colorado River also joins in the petition for intervention. The petition identifies (Pet. 1-2 n.2) the Confederation as a non-profit corporation organized pursuant to California law "through which the Tribes function." Since the petition states (*ibid.*) that the Confederation makes no claims to present perfected rights, no ground for its intervention has been established.

A closely related matter also pending before the Court is a joint motion filed in May 1977 by Arizona, Nevada, California, and seven California public agencies ("the State parties") seeking a determination of the non-Indian present perfected rights pursuant to Article VI of this Court's 1964 decree, 376 U.S. 340, 351-352, as amended, 383 U.S. 268. The supplemental decree proposed by the State parties listed the priority date and amount of the non-Indian present perfected rights claimed by the various parties, and included a provision giving Indian present perfected rights priority without regard to date of perfection. The objections the United States raised in its November 1977 response to the supplemental decree as first proposed in the joint motion have now been resolved, and on May 30, 1978 all affected parties² moved the Court for the entry of an agreed upon supplemental decree. Again, the non-Indian present perfected rights are listed and there is a more generous provision stipulating that the Indian present perfected rights shall have priority over all major non-Indian perfected

² By letter of March 14, 1978, the Attorney General of Utah advised the Court that Utah had no comment on the proposed supplemental decree, which does not affect Utah's rights to water from Colorado River tributaries. No comment has been received from New Mexico, whose rights as an Upper Basin state are unaffected by the proposed decree.

³ The proposed supplemental decree does not subordinate a limited category of so-called "miscellaneous" present perfected rights to the rights of the Tribes. Those rights total only 17,504 acre-feet of diversions, part of which are for municipal and industrial purposes. Most of those rights, when considered individually, are minimal and not all are senior to the tribal rights (February 1978 Memorandum in Opposition, p. 12 n.6).

rights³ without regard to date of priority when there is a shortage of mainstream water.⁴

II. INTERVENTION TO OPPOSE THE ENTRY OF SUPPLEMENTAL DECREE

The Three Tribes' opposition to the entry of the proposed supplemental decree is the primary ground for their motion for leave to intervene. The Three Tribes contend that the United States' acceptance of the proposed supplemental decree demonstrates the gross inadequacy of its representation of their interests (Motion, pp. 6-17; Pet. of Intervention, pp. 1-13).⁵ The United States' Memorandum in Opposition to the Three Tribes' motion, filed in February 1978, fully responds to these contentions, and demonstrates that the Three Tribes' objections to the proposed supplemental decree neither establish the inadequacy of the United States' representation of the tribal inter-

⁴ The proposed decree also eliminates any possible controversy over the use of tribal rights for other than agricultural purposes.

⁵ The Three Tribes' petition repeats their allegation that the government's conduct of all stages of this litigation has been tainted by a pervasive conflict of interest (Pet. 3-4, 22-23). They rely in part on a new affidavit (Pet. App. B) by the same Bureau of Indian Affairs employee whose prior affidavit was quoted in the initial brief of the Three Tribes. That view, like the documents cited in the initial motion and brief, does not represent the position of the Department of the Interior. See our February 1978 Memorandum in Opposition, p. 4 n. 2.

ests nor justify the Three Tribes' intervention.* We respectfully refer the Court's attention to that memorandum, to which we adhere.

III. INTERVENTION TO PRESENT NON-ARTICLE VI CLAIMS REGARDING BOUNDARY DISPUTES AND OMITTED LANDS

The Two Tribes' Motion for Leave to Intervene, in contrast, is not grounded on objections to the proposed supplemental decree. To the contrary, their motion states (Motion, p. 2) that the Cocopah and Colorado River Indian Tribes "approve and request the entry of a Supplemental Decree" as proposed in the ~~United States~~ February 1978 response^{of} to the State parties.

The Two Tribes seek to intervene to raise matters which they recognize do "not fall within the scope of the procedure set forth in Article VI of the Decree and the disposition of the pending Joint Motion [for the entry of the proposed supplemental decree]" (Motion, p. 6), but which, they urge, should be considered contemporaneously (*id.* at 10). First, the Two Tribes seek (*id.* at 5-9) to raise claims for additional present perfected water rights for lands that have been finally determined to be within the boundaries of their res-

* We note that after the completion of the Special Master's reports, the Navajo Tribe sought leave to intervene, and the United States opposed this motion in November 1961 on the grounds, *inter alia*, that our representation of the Navajo tribal interests had been adequate and that their motion was untimely. The Court denied the motion without opinion. *Arizona v. California*, 368 U.S. 917, reconsideration denied, 368 U.S. 950.

ervations since the entry of this Court's decree. Article II(D)(5) of that decree provided that the quantity of water to which the tribes were entitled should be "subject to appropriate adjustment by agreement or decree of this Court in the event that boundaries of the respective reservations are finally determined." 376 U.S. at 345.⁷ Second, the Two Tribes also seek to intervene in order to raise claims for lands within their reservations for which the United States "for reasons unknown to the two Tribes * * * failed or declined to present [claims] to the Special Master or to the Court" (Motion, p. 9).

Similar claims also form a second basis for the Three Tribes' Motion for Leave to Intervene (Motion, pp. 9-16).

Contrary to the Three Tribes' arguments, claims resulting from the resolution of boundary disputes and claims for "omitted" lands, *i.e.*, those for which no evidence was submitted to the Special Master, would not be affected or foreclosed by the entry of the proposed supplemental decree, which is limited to the issues involving Article VI of the Court's original decree. The Two Tribes expressly seek relief pursuant to Articles II(D)(5) and IX of this Court's

⁷ Article II(D)(5) expressly refers only to boundary disputes regarding the Fort Mohave Indian Reservation and Colorado River Indian Reservation, because disputes regarding these reservations were known to exist at the time of the decree. Subsequently similar disputes involving other reservations have come to light, and the tribes contend that rights for these boundary dispute areas should be decreed under Article IX. See the discussion at pp. 5-6 of the Two Tribes' Motion for Leave to Intervene.

decree (Motion, pp. 5-9), and the relief sought by the Three Tribes would also be under those provisions, not Article VI. Paragraphs 2 and 3 of the proposed decree state:

(2) This determination shall in no way affect future adjustments resulting from determinations relating to settlement of Indian reservation boundaries referred to in Article II(D)(5) of said Decree.

(3) Article IX of said decree is not affected by the list of present perfected rights.

Although the claims regarding boundary disputes and omitted lands will not be foreclosed or affected by the instant proceedings, the tribes contend that their claims are now sufficiently mature and precise to be presented to the Court, and the Two Tribes note (Motion, p. 11) that they "might even be fairly criticized if they failed now to present their claims to the Court and deliberately waited to do so until after consideration of the Joint Motion." They urge that until all their rights are finally determined their "losses inure annually to the benefit of others whose interests are subordinate, but who utilize water to which the Two Tribes would be entitled if their rights were perfected" thereby creating "a dependency which will influence and inflame opposition to the Two Tribes' subsequent efforts to perfect [those] rights" (Motion, p. 3). Accordingly, the Two Tribes assert that presentation of their claims now is essential.

A review of the petition filed by the Three Tribes and their supporting papers indicates that underly-

ing their objection to the proposed supplemental decree is a similar contention that the water rights for boundary dispute areas and omitted lands are now ripe and should be resolved immediately.

IV. THE UNITED STATES' POSITION ON THE BOUNDARY DISPUTES AND OMITTED LANDS

As noted in our February 1978 memorandum in opposition to the Three Tribes' motion (Memorandum in Opposition, p. 9), the United States agrees with the tribes that water rights must ultimately be determined for areas recognized as a part of tribal reservations as a result of the resolution of boundary disputes since the filing of the original decree. As also stated in that memorandum (*ibid.*), the United States intended to file a motion with the Court seeking a determination of these rights in the future, but it is not prepared to do so at the present time. We have not yet completed our review of matters including soil classification, hydrology, and agricultural engineering, and accordingly cannot yet quantify the rights we would assert on behalf of the tribes. In addition, as the Colorado River Indian Tribes themselves acknowledge (Motion, p. 11, n.*), two boundary disputes involving their reservation have not yet been finally resolved.

With regard to the claims of the tribes for lands recognized as within the reservation at the time of the proceedings before the Special Master but for which no claims were asserted (omitted lands), the Department of the Interior has not yet determined

whether it would recommend that the United States should assert any claims on behalf of the tribes, and further study of hydrological and technical data will be necessary before such a determination will be made.

The claims of the tribes themselves for omitted lands are not yet finally formulated. ~~The Cocopah~~^{~ skt. ~} Tribe states (Motion, p. 9) that it is not presently able to specify the number of practicably irrigable acres for which it will assert a claim, although it adds that these figures are now being computed. Appendix C to the Three Tribes' proposed petition in intervention, which sets forth^y their claims for both boundary disputes and omitted lands, also states that the figures supplied "are the most exact that are available," and notes that there is "possible overlapping" (Pet. App. C-1, footnote).

The presentation of claims for water for boundary dispute areas and for omitted lands will begin a new phase of these proceedings. The tribes' prompt effort to raise the boundary dispute matters stands in clear contrast to the Three Tribes' untimely effort to intervene to oppose the proposed supplemental decree in order to challenge non-Indian claims for present perfected rights more than ten years after these claims were first filed with the Court in 1967, and after more than 13 years of negotiations by all parties on this subject. In our view, the tribes' present effort to intervene to assert claims for boundary dispute areas is clearly timely—indeed the nub of the disagreement between the tribes and the United States on this matter is the tribes' dissatisfaction with the United

States' failure to date to complete its preparations to raise these claims.

Accordingly, although we continue to oppose the motion of the Three Tribes to Intervene in order to object to the entry of the proposed supplemental decree under Article VI, we view the tribes' efforts to intervene to raise new non-Article VI matters as standing on a different footing. We do not believe that our representation of the tribes' interests has been inadequate, nor do we believe there is a conflict of interest. Nevertheless, we recognize that the tribes do not agree with our judgment of the degree of preparation necessary before the assertion of their boundary dispute claims (and the speed at which these preparations can be completed). We also recognize that the tribes believe that it is not in their interest to delay the assertion of their claims to omitted lands until the United States determines whether it would raise such claims on their behalf. Therefore, if the Court concludes that the claims the tribes seek to present are sufficiently matured and definite to be entertained at present,^a we would not oppose the tribes' intervention to present these claims after the current Article VI proceedings have been

^a Should the Court conclude that it would not entertain these claims until the remaining boundary disputes are finally resolved and the claims of each tribe quantified (see pp. 8-9, *supra*), we would continue our efforts to review and develop these claims on behalf of the tribes. In such circumstances, if the tribes considered the claims and supporting evidence eventually developed by the United States to be satisfactory, there might be no need for intervention.

concluded by the entry of the proposed supplemental decree. Cf. *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463, 473-474; *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, and cases cited at 370-372.

Should intervention be permitted, our inclination would be to continue to support the tribes' efforts to obtain a declaration of the water rights to which they are entitled. But, of course, the degree and character of continued participation by the United States must depend on our assessment of the proceedings as they develop.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

MAY 1978.

MOTION FILED
SEP - 5 1978

IN THE
Supreme Court of the United States

October Term 1977
No. 8, Original of
October Term 1965

STATE OF ARIZONA,

Complainant,

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CITY OF SAN DIEGO, and COUNTY OF SAN DIEGO,

Defendants,

UNITED STATES OF AMERICA and STATE OF NEVADA,

Interveners,

STATE OF NEW MEXICO and STATE OF UTAH,

Impleaded Defendants.

Motion for Leave to File Brief Amicus Curiae and Brief Amicus Curiae on Motions for Leave to Intervene by Certain Indian Tribes.

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I.

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II.

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STATE OF NEW MEXICO and STATE OF UTAH,

Impleaded Defendants.

Motion for Leave to File Brief Amicus Curiae and Brief Amicus Curiae on Motions for Leave to Intervene by Certain Indian Tribes.

The undersigned counsel, a member of the bar of this Honorable Court, hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case. The consent from counsel for the following parties has been obtained:

State of California
State of Nevada
United States of America
Fort Mojave Tribe
Quechan Tribe of the Fort Yuma Indian Reservation
Chemehueve Indian Tribe
Colorado River Indian Tribes
Federation of Indian Tribes of the Colorado River
Palo Verde Irrigation District
Imperial Irrigation District
Coachella Valley Irrigation District
The Metropolitan Water District of Southern California
City of Los Angeles
City of San Diego
County of San Diego

The consent from counsel for the following parties was requested but refused:

State of Arizona
Cocopah Indian Tribe

Counsel has read and is familiar with the two pending Motions for Intervention by several Indian Tribes, and with the memoranda of parties hereto respecting said motions. Counsel respectfully submits that the pleadings on file fail to fully emphasize the inherent complexities in the granting of the motions for intervention. The Tribes seek to invoke the jurisdiction of this Court to settle water rights claims dependent on the outcome of land title disputes presently under administrative review, district court litigation or on appeal. These separate but related land title proceedings involve indi-

viduals who are not parties to this action. By their brief, the so-called Urban Agencies invite settlement of all these claims before a Special Master.

The interest of the undersigned counsel in this case arises from the fact that he is counsel of record for numerous private parties to several completed and pending administrative and judicial proceedings involving Tribal claims.

The undersigned counsel advocates neither the granting nor the denial of the two pending motions for interventions. Counsel's purpose is simply to bring to the attention of the Court matters omitted from any of the memoranda on the subject now before the Court.

Dated: September 8, 1978.

Respectfully submitted,

DONALD D. STARK

**Brief Amicus Curiae on Motion for Leave to Intervene
by Certain Indian Tribes.**

Statement.

In their Motion for Leave to Intervene As Indispensible Parties by the Fort Mojave Indian Tribe, the Chemehueve Indian Tribe, and the Quechan Tribe of the Fort Yuma Indian Reservation, as incorporated in their formal Petition for Intervention, the several Tribes represented by Mr. Simpson, urge that the Court undertake to make adjustments in the prior perfected rights of the various Tribes *by compensating for certain alleged boundary changes.*

By its response, The Metropolitan Water District of Southern California and the other "Urban Agencies" indicate that they do not oppose the permissive intervention of the Colorado River and Cocopah Indian Tribes "and believe a Special Master should be appointed to hear those claims together with similar boundary claims asserted by the Chemehueve, Quechan, and Fort Mojave Indian Tribes." (Response of MWD, p. 11.)

If this Court grants the motions for intervention and accepts the invitation in the response of MWD, the net effect will be that this Court would, in a proceeding before a Special Master, undertake to litigate and resolve pending land title disputes. It is respectfully submitted that a resolution of the boundary claims asserted by the Tribes must necessarily involve the rights and interests of private claimants not parties to this proceeding. Subsequent intervention by such private parties would appear to be a necessary adjunct of any determination of those issues by this Honorable Court.

ARGUMENT.

I.

If This Court Grants the Motions for Intervention and Undertakes to Make Adjustments in the Prior Perfected Rights of the Various Tribes, It Will Necessarily Resolve and Foreclose the Rights and Interests of Private Property Owners Not Parties to These Proceedings.

In its original opinion, this Court held:

“that the United States did reserve the water rights for the Indians effective as of the time the Indian Reservations were created . . . [that] the water was intended to satisfy the future as well as the present needs of the Indian Reservations . . . [that] enough water was reserved to irrigate all the* practicably irrigable acreage on the reservations . . . [and] that the only feasible and fair way by which reserved water for the reservation can be measured is irrigable acreage.” (*Arizona v. California*, [1963] 373 U.S. 546, 600-01.)

Thus it is clear that the only manner consistent with the Court's prior opinion in which an adjustment in the Tribes' entitlement to water may be effected is by adjusting the number of irrigable acres beneficially owned by the Tribes. It is equally clear that the Tribes' request that this Court undertake to adjust their present perfected rights is in effect a request that this Court undertake to settle and confirm all land title disputes referenced in Exhibit “C” of the Tribes' Petition for Intervention.

This Court has heretofore declined to determine disputed boundaries of the Colorado River Indian Reservation and the Fort Mojave Indian Reservation. Thus, it held:

“We disagree with the Master’s decision to determine the disputed boundaries of the Colorado River Indian Reservation and the Fort Mojave Indian Reservation. We hold that it is unnecessary to resolve those disputes here. Should a dispute over title arise because of some future refusal by the Secretary to deliver water to either area, then the dispute can be settled at that time.”
(373 U.S. at 601.)

The motions for intervention now suggest that the Court reconsider its earlier determination to refrain from undertaking resolution of land title disputes. In fact, The Metropolitan Water District of Southern California and the “Urban Agencies” have invited the Court to appoint a Special Master to determine these claims of the Tribes in this proceeding. (Response of MWD, *supra*, p. 11.)

If this Honorable Court undertakes such determinations, its actions will necessarily be expanded to affect the rights and interests of private claimants, who are not now parties to these proceedings. It is respectfully submitted that in the event this Court undertakes to determine such boundary disputes, directly or indirectly, through a Special Master, it may then become entirely appropriate for private claimants to seek intervention.

II.

The Motions and Petitions for Intervention and the Memoranda Respecting the Motions Now Before the Court Do Not Adequately Apprise the Court of Separate but Related Legal Proceedings Currently Pending.

The Tribes cite a “[f]ailure in the Response [of the United States] to correctly and fully advise this Court relative to the status of boundary claims of the Tribes . . .” (Motion for Leave to Intervene, p. 9, *et seq.*) It is respectfully submitted that they also do not fully advise this Court relative to the status of certain boundary claims of the Tribes.

The undersigned counsel represents landowners claiming lands within the disputed area of the Hay and Wood Reserve of the Fort Mojave by chains of title from Swamp and Overflow Patents from the United States to the State of California and from the State of California to private patentees. Although the Tribes in their Motion for Intervention (pp. 10-11) and in their Petition for Intervention (pp. 14-18) advise the Court of the boundary claim of the Tribes to land situated within the Hay and Wood Reserve they fail to inform the Court that the Secretary of Interior has not approved and adopted the dependent resurvey alluded to in the documents on file. They also fail to advise the Court that on July 15, 1977, the Bureau of Land Management published its Intent to File Dependent Resurvey (42 Fed.Reg. 37446): that by letter dated August 22, 1977, a protest to the proposed filing was submitted on behalf of certain landowners represented by the undersigned counsel; that the filing date for the proposed plat was suspended

on September 9, 1977, by order dated September 2, 1977 (42 Fed.Reg. 45405); and that a formal protest pursuant to the Administrative Procedure Act was filed by letter dated September 28, 1977.

Whether in a proceeding pursuant to the Administrative Procedure Act or in a subsequent proceeding in the United States District Court, the landowners propose to assert what they believe to be the very considerable error involved in the proposed redefinition of the boundary of the Hay and Wood Reserve of Fort Mojave. As heretofore indicated, it is submitted that the water rights of the Fort Mojave Indian Reservation dependent upon such factual determination cannot be resolved by this Honorable Court without first resolving land title disputes and the interests of persons not presently parties before this Court.

The Tribes contend in their motion for intervention, at p. 13, that:

"There are two areas in the Colorado Indian Reservation which were originally in the State of Arizona but due to avulsive action of the Colorado River are now situated west of that stream and in the State of California. Those two areas are respectfully [sic] known as the Ninth Avenue Cut-Off and the Olive Lake Cut-Off."

Although not germane to the question before the Court, the two areas are not now situated in the State of California as a result of the avulsive action of the Colorado River. Rather, they are so situated as a result of a redefinition of the boundary between Arizona and California pursuant to the Arizona-California Boundary Pact. (80 Stat. 340.)

What is germane, is that the Tribes indicate that all conflicts respecting title to the Ninth Avenue Cut-Off lands have been resolved. *United States v. Shaw Sales and Service, et al.* (U.S. Dist. Ct., Cent. Dist. Cal., No. 72-1622-R), was ordered dismissed upon settlement of the case without prejudice to re-open the same within sixty days upon good cause shown if settlement were not consummated. Through a series of stipulations, the date within which to consummate settlement was extended until August 2, 1974. Although the status of *United States v. Shaw Sales and Service, et al.*, is officially that of dismissal of the action, counsel for the parties, including the undersigned counsel, have diligently continued to effect a settlement of the action and anticipate a complete resolution of all disputes in the immediate future.

The Tribes also seek to have this Court decree to them present perfected rights in the Colorado River to irrigate 2,058 acres of irrigable and irrigated lands within the Olive Lake Cut-Off. The undersigned counsel represents all private parties in said action. (*United States v. Aranson, et al.* [CCA 9th No. 77-2295].) After full trial on the merits, judgment was filed favoring the Tribe on February 11, 1977. A timely appeal was taken to the United States Court of Appeals for the Ninth Circuit, where the matter is now pending. Briefs are on file but no schedule for argument or consideration by the Court has as yet been set. If this Court, through a Special Master, is to undertake a final determination of the Tribe's water rights dependent upon such land titles, it is respectfully suggested that it may then be appropriate for the private parties to the Olive Lake litigation to file their petition for

certiorari in that pending appeal in order that the matter be determined once and for all by this Honorable Court.

The Tribes also refer to *United States v. Brigham Young University*, U.S. Dist. Ct., Cent. Dist. Cal., No. 72-3058 MML) in which the undersigned counsel represented the defendants. A judgment was entered in that case confirming Tribal title, in consideration of the Tribe entering into long term leases of the subject land with the defendants. The Urban Agencies appear to seek review of those final judgments. Certainly, the private claimants have a concern with the finality and validity of the Tribal claims in those cases, which can properly be represented in this case, if interventions make that appropriate subject matter.

Conclusion.

It is not the intent of the undersigned counsel, by the filing of this brief *amicus curiae*, to advocate either the granting or denial of the pending motions for intervention. Counsel simply seeks to bring to the attention of this Court inherent complexities in the granting of the motions for intervention. It is submitted that an adjustment in the present perfected rights of the petitioning Tribes and the incidental resolution of land title disputes must necessarily involve the rights and interests of private claimants not parties to the instant proceedings. As counsel of record for private parties in several such land title disputes involving the Fort Mojave Indian Reservation and the Colorado River Indian Reservation, the undersigned counsel is, of course, prepared to resolve those matters in the normal forum of the United States District Court and the

Court of Appeals for the Ninth Circuit. However, the undersigned counsel is equally willing to resolve those matters, if authorized by this Court, in proceedings before a Special Master.

Dated: September 8, 1978.

Respectfully submitted,

DONALD D. STARK,

Counsel for Amicus Curiae.

Service of the within and receipt of a copy
thereof is hereby admitted this day
of September, A.D. 1978.
